TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 900.

MICHAEL McSTAY, PETER DONAHUE, AND JOHN KELSO, PLAINTIFFS IN ERROR,

vs.

JOSEPH S. FRIEDMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 10, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of California, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of the said State, in which a decision could be had in the said suit between Joseph S. Friedman as plaintiff and respondent, and Michael McStay, Peter Donahue, and John Kelso, as defendants and appellants, wherein the said McStay, Donahue, and Kelso claimed a right, title, and privilege to certain property in the complaint and judgment in said action described, under a certain statute of the United States, and wherein the decision was against the said title, right, and privilege so set up and claimed by said McStay, Donahue, and Kelso, a manifest error hath happened, to the great damage of the said McStay, Donahue, and Kelso, as by their complaint appears:

We, being willing that the error, if any hath been, should be duly
2 corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, the fourth day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Cir. Court, Dist. of Cal.,
By J. F. O'BEIRNE,
Dep. Clk.

The writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice U. S. Supreme Court.

(Indorsed:) United States Supreme Court. Michael McStay and others, plaintiffs in error, vs. Joseph S. Friedman, deft. in error. Writ of error. Filed August 4th, 1875. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

3 Due service of a true copy of within trans. admitted this 4th Ap'l, 1873.

S. W. HOLLADAY,
Resp'd'ts Atty.

Copy.

No. 3733. In the supreme court of the State of California. Joseph S. Friedman, respondent, vs. Michael McStay et al., appellants. Tran-

script on appeal. Sharp & Lloyd, attorneys for appellants; S. W. Holladay, attorney for respondent.

Filed April 5th, 1873.

GRANT I. TAGGART, *Clerk.*
By ALLEN TILLINGHAST, *Deputy.*

4 In the supreme court of the State of California.

Transcript on appeal.

In the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco.

JOSEPH S. FRIEDMAN, PLAINTIFF,
vs.
MICHAEL MCSTAY, JOHN KELSO, PETER DONAHUE, T. G. MAGUIRE, MICHAEL HAWKINS, EDWARD MARTIN, JOHN DOE, and RICHARD ROE, (whose real names are unknown to plaintiff, and which he asks to have inserted when discovered,) defendants.
} Complaint.

The complaint of the above-named plaintiff shows to this court
5 that, on the 20th day of January, A. D. 1868, plaintiff was possessed, as owner in fee-simple, and lawfully entitled to the possession and ever since hath been such owner of that certain piece or parcel of land, situate in the city and county of San Francisco, State of California, bounded and described as follows:

Commencing N. 7 chains 76 links and W. 9 chains 33 links from S. W. corner of section 7, township 2 south, range 5 west; thence N. 89 deg. 45 min. E. 37 chains 56 links; thence N. 81 deg. 45 min. E. 22 chains 41 links; thence N. 35 deg. W. 8 chains 93 links; thence N. 32 deg. 45 min. W. 22 chains 92 links; thence S. 82 deg. 45 min. W. 3 chains 58 links; thence N. 89 deg. 15 min. W. 8 chains; thence S. 89 deg. W. 13 chains 38 links; thence S. 88 deg. 45 min. W. 13 chains 94 links; thence S. 77 deg. 30 min. W. 3 chains 35 links; thence S. 11 deg. 45 min. W. 8 chains 14 links; thence S. 5 deg. 30 min. E. 4 chains 81 links; thence S. 4 deg. 45 min. E. 8 chains 11 links; thence S. 3 deg. E. 7 chains 89 links, to the place of beginning.

That, being so possessed thereof, the said defendants afterwards, to wit, on the 21st day of January, 1868, unlawfully entered upon said premises and ousted said plaintiff therefrom against his will and title, and said defendants still unlawfully withhold the possession thereof from plaintiff, to his damage in the sum of five hundred dollars, being the value of the rents and profits thereof.

6 Wherefore plaintiff demands judgment against said defendants; that they surrender to him the possession of said land and premises, and pay to him the sum of five hundred dollars damages for the unlawful withholding thereof, together with the costs and disbursements of this action.

GEO. F. & WM. H. SHARP,
Attys. for Plaintiff.

Duly verified.
Filed January 24th, 1868.

Answer.

[Title of court and cause.]

The said defendants, Peter Donahue, Michael McStay, and John Kelso, for answer to the plaintiff's complaint herein, deny, on information and belief, that said plaintiff was possessed as owner, or entitled to the possession, or hath been such owner of the premises in said complaint described, or any part thereof, as in said complaint is respectively alleged or otherwise.

Further answering, defendants deny that, on the twenty-first (21st) day of January, A. D. one thousand eight hundred and sixty-eight, (1868,) or at any other time, they, or any of them, entered into or upon said land or premises unlawfully or otherwise, or ousted said plaintiff therefrom against his will or title, or that these defendants, or any of them, have at any time or do still withhold the possession of said premises, or any part thereof, from said plaintiff, to his damage in the
7 sum of five hundred (500) dollars, or any other sum whatsoever.

Defendants deny, on information and belief, that said plaintiff is, or was ever, at any time, possessed, or the owner of, or is or was ever entitled to the possession of, or has or ever had any title to said land and premises, or any part thereof.

Further answering, these defendants aver and allege that Peter Donahue is now, and was at the date of the commencement of this action, and for more than five (5) years theretofore had been, the lawful owner, in fee-simple, of the lands and premises in said complaint described, and that the said Donahue, by himself and his tenants, to wit, the said defendants Michael McStay and John Kelso, are, and were at the time of the commencement of this action, in the lawful possession of said land and premises.

And for a further and separate answer and defense, these defendants aver and allege that said plaintiff ought not to have or maintain this action, because they admit and aver that the said defendant, Peter Donahue, is now, and for more than six (6) years last past has been continuously, by himself and his tenants, in the actual bona-fide possession of said land and premises, and every part thereof.

And for a further and separate answer and defense to said action, said defendants aver and allege that said plaintiff ought not to have
8 or maintain his said action because said defendants say and aver that neither said plaintiff nor his ancestors, predecessors or grantors, nor any nor either of them, were seized and possessed of the said land and premises, or any part thereof, within five (5) years next before the commencement of this action.

And for a further and separate answer and defense these defendants allege and aver that the plaintiff ought not or have to maintain his said action, because they say and aver that said defendant, Peter Dohahue, and those under whom he claims, entered into the possession of the said land and premises under claim of title exclusive of any other right, founding such claim upon a written instrument as being a conveyance of said land and premises, and the said defendant Donahue has, and those under whom he claims have been in the actual, lawful, peaceable, quiet, open, notorious, exclusive, and continued occupation and possession of the said premises, and every part thereof, for more than five (5) years next before the commencement of this action, and for more than ten (10) years next before the commencement of this action, claiming, holding, and occupying the same adversely to the said plaintiff and his predecessors, and all persons whomsoever, and all the world.

And for a further and separate answer and defense to said action, these defendants aver that the title to said land and premises, if
9 not in the said Peter Donahue, is outstanding in some person or persons other than said plaintiff, whose names are unknown to these defendants.

And for a further and separate answer and defence to said action these defendants aver that the said plaintiff ought not to have or maintain said action, because they aver that the said defendant, to wit, Peter Donahue, heretofore became, has since been, and now is the lawful owner in fee-simple of the said land and premises.

And the said Donahue, by his tenants, the said McStay and Kelso, are in the lawful possession thereof.

And for a further and separate answer and defence to said action the said defendants aver that said plaintiff ought not to have or maintain his said action, because they say that the Congress of the United States did, on the eighth (8) day of March, A. D. eighteen hundred and sixty-six, (1866,) pass an act entitled "An act to quiet the title to certain land within the corporate limits of the city of San Francisco," which said act was duly approved on the said eighth (8) day of March, A. D. eighteen hundred and sixty-six, (1866,) and the board of supervisors of the city and county of San Francisco did pass an order or ordinance numbered eight hundred, (800,) which said order was duly approved by the mayor, and president of the said board of supervisors on January fourteenth, (14,) eighteen hundred and sixty-eight,
10 (1868,) and which is entitled "an order for the settlement and quieting of title to land in the city and county of San Francisco, situated above high-water mark of the bay of San Francisco and the Pacific Ocean, and without the corporate limits of the city of San Francisco," and the legislature of the State of California did, on the twentieth (20) day of March, A. D. eighteen hundred and sixty-eight, (1868,) pass an act entitled "An act to confirm a certain order passed by the board of supervisors of the city and county of San Francisco," which said act was approved on said last-named day, and which said act ratified and confirms said order No. eight hundred, (800,) and all proceedings theretofore had, and which had then taken place, and all proceedings that should or shall thereafter or hereafter take place under the provisions of said order were and are ratified and confirmed in all respects.

And defendants further aver that said Donahue, by himself and his tenants, was, at the time of the commencement of this action, in the bona-fide actual possession and occupation of said land and premises, and was, on the eighth (8) day of March, A. D. eighteen hundred and sixty-six, (1866,) and for more than five (5) years prior thereto, and have ever since been continuously, and is now, in the actual bona-fide, and the bona-fide actual possession, by himself and his tenants, of said lands and premises, and of every part thereof, and that the said Donahue did, prior to the day of April, A. D. eighteen hundred
11 and sixty-seven, (1867,) pay all taxes which had been assessed on said land and premises during the five (5) fiscal years preceding the year beginning.

That the said lands come within the class of lands and are a part of those lands described in said order, and the said act of the legislature, and the said act of Congress, and the decree of the circuit court of the United States for the northern district of California, entered on the eighteenth day of May, A. D. eighteen hundred and sixty-five, (1865.)

That the said lands are now, and were at the commencement of this action, and have been for more than five (5) years last past, situate within the corporate limits of the city and county of San Francisco, above the natural ordinary high-water mark of the bay of San Francisco, and the Pacific Ocean, as they existed on the seventh day of July, A. D. eighteen hundred and forty-six, (1846,) and without the corporate limits of the city of San Francisco, as defined in the act to incorporate the said city passed by the legislature of California on the fifteenth (15) day of April, A. D. eighteen hundred and fifty-six, (1856.)

That the said board of supervisors did devise and adopt a plan for the subdivision into blocks and lots of all the lands embracing the said lands in controversy herein in said order included as therein provided in all respects and immediately after the passage of said order.

That thereafter said board did cause a map of said lands
12 included in said order as in all respects therein provided; that the said map is not yet completed, nor has the same been deposited in the office of the clerk of the board of supervisors as provided in section three (3) of said ordinance.

That the said defendant Donahue, in compliance with section four (4) and the other sections of said ordinance, has presented his claim to said lands with a description and diagram thereof to the committee of said board on outside lands, and have had the same delineated on said map and the same now appears thereon.

And the said Peter Donahue avers that it his intention, and that he is ready and willing to comply with, and to do and perform each and every act, and to make all payments to be by him or on his part complied with, done, or performed, or made by the terms of said order or ordinance, or said act of the legislature or said act of Congress, whenever and as fast as the terms thereof and the proceedings to be taken or had thereunder will permit the same to be done, performed, or made; and said Donahue avers that by his said act he has heretofore availed himself, and it his intent and determination now and hereafter to avail himself of the rights and benefits conferred by said order, the said act of the legislature, and said act of Congress.

And the said defendants say that the said defendant Peter Donahue
is entitled to all the rights, privileges, benefits and advantages
13 conferred by said order, or said act of the legislature, or act of Congress, and entitled to and has become the owner in fee-simple of all the right, title, and claim which the said city and county ever or may hereafter acquire as the successor of the Pueblo of San Francisco, or as the grantee or assignee or patentee of the (U. S.) United States, in and to the said lands and premises, and that he has become and is the owner in fee of said lands and entitled to the possession thereof.

Further answering, the said defendants, Michael McStay and John Kelso, aver that they were before and at the time of the commencement of this action, and for a long time theretofore had been, the tenants of said Donahue, and that in the defence of this action they intend to rely upon and give in evidence the title and possession of said Donahue in and to said land and premises.

Wherefore, said defendants Donahue, McStay, and Kelso pray to be hence discharged, and for judgment for their costs.

SHARP & LLOYD,
Att'ys for defendants Donahue, McStay, and Kelso.

Duly verified, filed, and served July 8, 1868.

Answer.

[Title of court and cause.]

And now come the defendants T. G. Maguire, Michael Hawkins, Edward Martin, John Doe, and Richard Roe, and disclaim
14 any and all right, title, interest, and possession in or to the lands or premises in the complaint herein described, or any part thereof.

The said T. G. Maguire and Michael Hawkins, answering separately, each for himself, says that, prior to and at the time of the commencement of this action, he held a legal title to an undivided interest in and to the premises in complaint described, but that he held the same in trust for his codefendant Donahue, and that since, to wit, on the 24th day of June, A. D. 1868, he has conveyed said undivided interest and all his right, title, and interest in and to said premises to said Donahue.

Wherefore defendants pray to be hence dismissed, and for general relief.

SHARP & LLOYD,
Attys. for Defendants.

Duly verified, served, and filed July 20, 1868.

Judgment.

[Title of court and cause.]

The above-entitled cause came on regularly for trial before the court, on the 20th day of December, A. D. 1871, whereupon, S. W. Holladay appeared as attorney for the plaintiff, and Soloman A. Sharp and W. H. Patterson appeared as attorneys for the defendants, and the cause having been heretofore dismissed by consent of counsel and
15 order of court, as to the defendants T. G. Maguire, Michael Hawkins, and Edward Martin—

The following-named were duly empannelled and sworn as a jury to try the cause, namely, W. G. Doolittle, Asa D. Hatch, Thomas J. Fay, Bradbury Sanborn, David E. Dickerson, J. M. Russell, C. T. Forrest, R. H. Adams, G. W. Clapp, Ch. Seitz, R. B. Turner, and F. J. Hoin. The trial of the cause commenced and proceeded from day to day. The respective parties having introduced their testimony, oral and documentary, and the said counsel for the respective parties having fully argued the cause, and the court having instructed the jury as to the law of the case, the jury, on evening of January 11th, 1872, retired for deliberation, with instructions of the court, and by consent of counsel, to bring in a sealed verdict in the morning at the opening of the court. Whereupon, on this 12th day of January, A. D. 1872, the jury being called, and all found present, returned their sealed verdict in writing to the court, which being opened and spread on the minutes, read as follows:

[Title of cause, as above.]

"We, the jury in the above case, do find for the plaintiff, as follows: No 1, entitled the DeBrot tract, containing $34\frac{30}{100}$ acres, one-fourth being $8.57\frac{1}{2}$ acres. No. 2, being that portion of the Fleschhacker claim in the most southerly corner and outside the DeBrot tract, con-
16 taining $8\frac{57}{100}$ acres, one-half being $4\frac{38\frac{1}{2}}{100}$ acres. No. 3, being that portion of the Fleschhacker claim lying to the north and east of the DeBrot tract, and embraced within the Donahue tract, containing $15\frac{66}{100}$ acres, one-half being $7\frac{83}{100}$ acres. The whole amounting to twenty

and sixty-nine one-hundredth acres, ($20\frac{69}{100}$.) The above numbers, 1, 2, and 3, refer to the diagram of V. Wackenreuder in plaintiff's Exhibit No. 2, (signed by said jurors, and dated January 11, 1872.)

The said verdict being read to the jury, after being so recorded, and the jurors being polled, severally answered thereto that that was his verdict. Whereupon, by reason of the law and the premises aforesaid, it is now hereby ordered, adjudged, and decreed that Joseph S. Friedman, plaintiff, do have and recover from the defendants, Michael McStay, Peter Donahue and John Kelso, the possession of the following-described land, to wit:

No. 1. An undivided one-fourth part of that certain piece or parcel of land situate, lying and being in the city and county of San Francisco, State of California, bounded and described as follows:

Commencing at the southwesterly corner of Meyer's claim, marked on said diagram as "Meyer's claim," thence running north 52 deg. 30 min. west 16.04 chains; thence south 48 deg. 35 min. west 4.09 chains; thence north 43 deg. west 16.20 chains; thence south 89 deg. west 10.48
17 chains; thence south 88 deg. 45 min. west 0.25 chains; thence south 43 deg. east 25.10 chains; thence south 41 deg. 15 min. east 10.27 chains; thence north 60 deg. east 6.93 chains; thence north 56 deg. 30 min. east 2.48 chains; thence north 65 deg. 30 min. east 6.24 chains, to the point of beginning, containing $34\frac{30}{100}$ acres of land, one-fourth being $8\frac{57\frac{1}{2}}{100}$ acres and—

No. 2. An undivided one-half part of that certain tract or parcel of land situate, lying, and being in the said city and county, bounded and described as follows, to wit:

Commencing at "Meyer's Corner," thence running south 56 deg. west 18.45 chains; thence south $81\frac{3}{4}$ deg. west 1.60 chains; thence north 34 deg. west 29.55 chains; thence south 43 deg. east 18.65 chains; thence south 41 deg. 15 min. east 10.27 chains; thence north 60 deg. east 6.93 chains; thence north 56 deg. 50 min. east 2.48 chains; thence north 65 deg. 30 min. east 6.24 chains to the point of beginning, containing $8\frac{57}{100}$ acres of land, one-half thereof being $4\frac{28\frac{1}{2}}{100}$ acres; and—

No. 3. An undivided one-half of the following-described parcel of said land commencing at "Meyer's Corner;" thence running north 52 deg. 30 min. west 16.04 chains; thence south 48 deg. 35 min. west, 4.09 chains; thence north 43 deg. west 16.20 chains; thence north 89 deg. east
18 2.90 chains; thence south 89 deg. 15 min. east 8 chains; thence north 82 deg. 45 min. east 3.10. chains; thence south 34 deg. east 23.05 chains, to the point of beginning, containing $15\frac{66}{100}$ acres, one-half being $7\frac{83}{100}$ acres. The whole amounting to twenty and sixty-nine one-hundredths acres ($20\frac{69}{100}$.) The above numbers 1, 2, and 3 and designation "Meyer's Corner," referring to the diagram of V. Wackereuder in plaintiff's Exhibit No. 2, used in the trial and filed in this cause, and being a portion of the lands and premises described in the complaint herein, all of which parcels of land lie within and are a part of the easterly portion of the tract of land in said city and county of San Francisco known and called the "Fleischacker ranch," the "Belvidere ranch," or "Donahue ranch." And it is further ordered and adjudged that the plaintiff do have and recover of the said last-named defendants, his, the plaintiff's, costs in this action, taxed at fifteen hundred and five dollars and ten cents, ($1,505.10.)

Decree recorded January 16, 1872.—[C. p., 208.]

Notice of intention to move for a new trial.

[Title of court and cause.]

Messrs. G. F. & W. H. SHARP, and PORTER & HOLLADAY,
Att'ys for Plaintiff:

GENTLEMEN: You will please take notice, that the defendants herein intend to move the court to vacate and set aside the verdict
19 rendered in the above cause, and the judgment therein entered, and grant them a new trial of said action.

Said motion will be made on the following grounds, viz:

I. Accident and surprise which ordinary prudence could not have guarded against.

II. Newly-discovered evidence, material for the said defendants, and which they could not with reasonable diligence have discovered and produced at the trial.

III. Insufficiency of the evidence to justify the verdict and judgment.

IV. That the verdict and judgment are against law.

V. That the verdict and judgment are against the evidence.

VI. Errors in law occurring at the trial, and excepted to by defendants.

VII. Irregularity in the proceedings of the jury, by which the defendants were prevented from having a fair trial.

VIII. Misconduct of the jury.

IX. Irregularity in the proceedings of the plaintiff, by which the defendants were prevented from having a fair trial.

Dated, San Francisco, January 17, 1872.

Respectfully, etc.,

SHARP & LLOYD,
Def'ts' Attorneys.

20 *Engrossed statement on motion for a new trial.*

[Title of court and cause.]

This cause came on regularly for trial before Hon. S. H. Dwinelle, judge of said court, and a jury, on the 20th day of December, A. D. 1871, and at the December term of said court.

S. W. Holladay, esq., appearing as counsel for plaintiff, and Messrs. Sol. A. Sharp and W. H. Patterson appearing for defendants, whereupon the following proceedings were had:

By the COURT. It might be considered that, so far as the rulings of the court with reference to the deeds and written papers, supposed to have been sig ied by Donahue, are concerned, will be the same probably as at former trial, and they may be considered read, subject to the objections and exceptions as before. I think the several papers may be considered in evidence in order to save time, and may be used by either party.

Mr. HOLLADAY. Very well.

Mr. SHARP. We have no objection.

The COURT. Let it appear that all the papers and evidence that was rejected or ruled out by the court at the last trial shall be considered as offered and ruled out with the same objections and exceptions as at the last preceding trial in August last, from August 7th to the
21 13th. The same diagrams and maps used in that trial are also considered as evidence, subject to the same rulings then made.

Mr. HOLLADAY. It is understood, also, from the evidence that the "red line" in the "glass-case map," then and now produced, describes the land in the complaint, the glass-case map being the diagram of the claim as fenced, and in complaint described, drawn by Wackenreuder, July, 1871.

MILO HOADLEY, being sworn as a witness for plaintiff, testified as follows:

That he is a surveyor; that he knew the premises in question well—the place where Samuel Fleishacker first lived in 1850. In August, 1850, I went there and found a house, and Harry DeBrot. There was a small house there, and Henry DeBrot was there, in the house or about it, he claiming the house as his own place. There has been a milk ranch for a long term of years on the same ground where the house stood.

Mr. Holladay, on behalf of plaintiff, then offered and read in evidence a deed from Henry DeBrot to Samuel Fleishacker, G. H. Davis, and Israel E. Woolf, dated May 25th, 1852, recorded same day in liber 11 of deeds, page 446, the description of which deed is as follows, viz: Commencing at the southeast corner of eighty-acre lot of land belonging now, or lately, to Luzard Atsupard; thence running north 52 deg. 30 min. west 16 chains 4 links; thence south 48 deg. 35 min. west
22 4 chains 90 links; thence north 43 deg. west 74 chains 65 links; thence south 40 deg. 40 min. west 8 chains 50 links; thence south 43 deg. east 74 chains 65 links; thence south 41 deg. 15 min. east 10 chains 27 links; thence north 60 deg. east 6 chains 93 links; thence north 56 deg. 50 min. east 2 chains 48 links; thence north 65 deg. 30 min. east 6 chains 24 links to the place of beginning, containing 80 acres of land, more or less, together with the buildings and improvements thereon. This deed describes the tract designated at the trial as the DeBrot tract, and embraced in the green lines on the glazed map.

Per CURIAM. Was this deed offered before?

Mr. HOLLADAY. Yes, sir.

Per CURIAM. Then it is in evidence; they are all in evidence, and you have a perfect description of the short-hand reporter's transcript of his notes.

Mr. SHARP. I understand the whole original title of both sides is in.

The COURT. Yes; all the testimony taken before. It is agreed to be read from the short-hand reporter's transcript of his notes.

The defendants objected to the above-mentioned deed from DeBrot to Fleishacker et als., on the ground of immateriality; that it does not describe any land shown to have been in the possession of DeBrot, the grantor; that the purported lines do not inclose any land, and that DeBrot is not shown to have had any title to the lands described in the deed.

23 The court overruled the objection, to which ruling of the court defendants then and there excepted. Exception No. ½.

Mr. Holladay, on behalf of plaintiff, offered in evidence a certified copy of a deposition of Henry J. Labatt, a witness residing in the city of Galveston, in the State of Texas, and produced and sworn and examined on behalf of the plaintiff, before and by R. D. Johnson, under and by virtue of a commission duly issued out of said court, said certified copy being read in evidence by consent, with the same effect as if the original deposition was produced.

"My name is Henry J. Labatt; age, 40; residence, Galveston, Texas;

occupation, counsellor at law. I lived in San Francisco from 1853 to 1863, and practiced law there all that time. I was a partner in the law-firm of Cardoza & Labatt from 1853 until 1855 or '56; was acquainted with Peter Donahue and had business transactions with him. I knew Samuel Fleishacker of San Francisco, well, and knew the Fleishacker, or Belvidere ranch, well; it was so known or called in 1861. I have looked at and recognized the document marked 'Acknowledgment,' dated May 23d, 1861, and recognize the same. The original, I think, is in the handwriting of David Bixler. I saw Peter Donahue sign the original in Eugene Casserly's office, in third story of Davidson's Bank, on the day of its date. David Bixler signed it as a witness, and
24 it was delivered to me and I had it recorded. Bixler was Casserly's clerk and Casserly was Donahue's lawyer at the time. It was prepared under Casserly's advice and signed by Donahue, and delivered to me."

Mr. Sharp, on behalf of defendants, moved to strike out as much of the foregoing paragraph as relates to the delivery of the paper.

The court overruled the motion; to which ruling defendants then and there excepted. Exception No. 1.

Eighth interrogatory. Can you state under what circumstances that paper was made, at whose instance, where or in what office it was written; and if you shall answer that you ever saw the original of that paper after its having been signed by Peter Donahue and witnessed by David Bixler, then state if you know what business or negotiation led to its execution, and state in whose hands or possession it was when you last saw it.

Mr. Sharp, on behalf of the defendants, moved to strike out certain portions of the answer thereto.

The COURT. I will strike out all of the answer except the following words: "I put a man named John in charge of the ranch; he was there for years after Donahue acquired an interest by deed. I still represented Woolf in conjunction with Lewis Cohn, and Donahue assumed
25 absolute ownership. I called on Donahue, and he evaded the matter so as to excite my attention. I threatened him with legal proceedings by injunction if he attempted to dispossess this tenant, John, or threatened suit for partition. Knowing Casserly was Donahue's lawyer, I laid the matter before Casserly. and he had an abstract of the title made by Bixler. Casserly advised Donahue to acknowledge the fact in writing—a copy of which is annexed to this deposition; the paper was prepared, executed, and delivered to me."

Mr. PATTERSON. We think the last part ought to go out.

The COURT. Not if he knows the fact; he says he does.

Mr. PATTERSON. We reserve an exception to the court's ruling refusing to strike out. Exception No. 2.

"I had said document in my hands and possession, and I am certain that I recorded it and placed it among my papers in my tin box. If I ever delivered the original muniments of title I had to that land, it was with them, and I may have done it. I was on the land very frequently, and scarcely was a month without visiting it, and often every week. I hunted there many Sundays. I went there in the blackberrying season, and I had a fence covered with briar-vines; said tract was occupied by a tenant, named John; I do not recollect his other name; he was a medium-sized man, a raw-boned Welshman, or other foreigner; he spoke very indistinctly; he was put in possession by me, and by me
26 alone, and held possession for Woolf and Davis, and other assignees by mesne conveyances; he looked to me alone. He oc-

cupied said tract till about the time Donahue gave the acknowledgement; then Donahue made other arrangements. Neither Woolf nor Davis, whom I knew intimately, lived upon said tract in person. Fleishacker did live upon it, and cultivate it. After Fleishacker was dispossessed, Davis deeded to Cardoza and myself. Woolf then had stock upon the ranch—hogs and horses; I don't remember cattle. Davis was interested with Woolf, I believe, in the stock, but had transferred to us his title to the land. I don't remember the full particulars, but there was as many as four horses, and I think about twenty hogs. I saw and received the original acknowledgement when Donahue signed it in Mr. Casserly's office, in Bixler's presence. I conversed with Mr. Donahue about it to the extent that his signing that document and acknowledging Woolf's half interest was just and proper. He assumed it was all his until I threatened instant legal proceedings. John, the tenant, only recognized me, and I refused to allow Donahue to make any change until he recognized Woolf's half interest. I told him I recognized his half, and he must do likewise to Mr. Woolf. Which acknowledgment is hereinafter inserted, signed by Donahue and witnessed by Bixler."

Cross-examination:

27 "I have received, prior to this examination, but one letter from the plaintiff or his attorney. It is the only one I have ever received. I annex it as Exhibit B.

H. J. LABATT."

JOSEPH WORES, being called as a witness on the part of plaintiff, being duly sworn and examined, testified:

Q. Did you ever claim an interest in the Belvidere ranch?

A. Yes, sir; I had an interest of four acres.

Q. From whom did you purchase it?

A. From Ullman.

Q. Did you get any papers?

A. Yes, sir; I got several deeds and this paper with it.

Q. Look at the paper witnessed by Bixler, now in your hand, and state if you ever saw that paper before.

A. Yes, sir; I had it in my possession.

Q. Where did you get it?

A. From Ullman.

Q. The last witness?

A. Yes, sir.

The COURT. He testified all about that before. I remember distinctly.

By Mr. HOLLADAY. Was Mr. Donahue's signature on it then?

A. Yes, sir.

Q. It has been scratched out since?

A. Yes, sir.

Q. To whom did you sell that interest?

A. I sold my interest. I swapped with Donahue.

28 Q. Did you make a conveyance to him?

A. Yes, sir.

Q. To Peter Donahue?

A. Yes, sir.

Q. What did you do with this paper?

A. I gave it to Mr. Donahue.

Q. Signed by Donahue and witnessed by Bixler?

A. I gave it to Donahue and the paper with it.

Mr. SHARP. We object to this; it is all in evidence.

The COURT. I think it is in one, and I think in both trials.

Mr. SHARP. You testified to this same matter in both cases?

A. The same matter in both cases.

Mr. HOLLADAY. Mr. Friedman never had this paper in his possession during the time you kept it?

A. Yes, sir.

Q. That is from the time you purchased from Ullman and received this paper up to the time you conveyed to Donahue?

A. Yes; Mr. Friedman had it some length of time; I don't know how long. I showed it to him.

Q. For what purpose?

A. To settle up; to settle with Donahue for that four-acre interest, or eight acres in fact—my own and Mr. Ullman's.

Q. To settle your claim and Ullman's with Mr. Donahue?

29 A. Yes, sir.

Q. Was he acting for you at that time?

A. I believe so.

Q. Did you request him to, I mean?

A. Yes, sir.

Cross-examination:

By Mr. SHARP. Then you gave it to Mr. Friedman for the purpose of his acting as agent of you and Ullman to settle with Mr. Donahue, as between you and Ullman?

A. Yes, sir.

Q. You then gave it to Mr. Donahue?

A. Yes, sir.

Mr. HOLLADAY. Was Ullman claiming an interest in the land too?

Mr. SHARP. I object to that; you must show that properly.

Mr. HOLLADAY. Very well; that is all.

By Mr. HOLLADAY. What date was it you delivered that paper-acknowledgment back to Mr. Donahue?

A. I could not state exactly the date; it was the date when I made the deed to Donahue.

Q. Can you state the date of that deed to Donahue?

A. It was somewhere about 1867, I think.

Q. How soon after that was Friedman informed of the fact that you had delivered the paper back to Donahue?

Mr. PATTERSON. We object to that as immaterial.

30 The COURT. He stated it before, and Friedman also verified it by his testimony; each gave his recollection.

Mr. PATTERSON. No cause of action arose on behalf of Friedman or anybody else, from the fact of the redelivery of that paper to Donahue.

The COURT. I think that they have a right to get the history of that paper, and to get at its custody up to the time of the commencement of the action, because it bears upon the question of delivery. Answer the question.

A. I could not state exactly the date, but it was soon after—shortly after.

Mr. SHARP. We reserve an exception. (Exception No. 3.)

Mr. HOLLADAY. Q. When you first gave the paper to Donahue, did you tell Friedman of it immediately, or soon afterwards?

A. I think I gave it to him immediately; I think I stated so on the former trial.

Q. Is your memory very certain?

A. It must have been very near to the time; if it was not the same day, probably it was the next day after; I could not remember now, it is so long.

Cross-examination:

By Mr. SHARP. Mr. Friedman occupies a desk in your place, does he not?

A. He has an office up-stairs in my house.

Q. You see him every day?

A. Yes, sir.

31 Q. You stated in your examination on the last trial that when you showed this paper to Donahue, among other things he told you it was obtained from him by fraud, and it was not delivered.

Mr. HOLLADAY. No; he did not say that; I do not want words put in the witness' mouth on so important a matter; if it was an immaterial matter I would not object.

Mr. SHARP. You stated as follows, according to the report: "Well, he said, (meaning Donahue,) I do not deny my signature, but this paper was got out of me by fraud." Well, to save time, I will ask what did you say on that occasion, and what did Donahue say as to how the paper was obtained from him?

Mr. SHARP. What did Donahue say as to how it was obtained from him?

A. I believe that is all.

Mr. HOLLADAY. What were the words?

A. That it was obtained by fraud from Mr. Donahue—that paper.

The COURT. That it was obtained from him by fraud?

A. Yes, sir.

Mr. SHARP. After that, how soon did you see Friedman?

A. Well, as I said before, pretty soon after; perhaps the same day, and perhaps the next day.

Q. Did you tell Mr. Friedman as to what Donahue said?

32 A. I do not know if I did tell him; I could not state.

Q. Are you not sure you did?

A. I told him of the transaction I made with Donahue—that I had made the arrangement.

Q. How long was that before you made the arrangement when you first showed it to Donahue in your place? Before you made the arrangement did you not tell Mr. Friedman what you did, and what Donahue said?

A. It is very likely; I can't remember the words I said to him; I believe you will find it in the first examination; that was nearer to the time, and I remembered better.

Q. Was not Mr. Friedman acting at that time as agent between you and Mr. Donahue?

A. Yes, sir.

Q. Did you converse freely with him about the whole subject-matter?

A. Yes, sir; I think I did.

Q. Did you not tell him what transpired between you and Donahue, in that interview, at your store? What is your best recollection about it?

A. I might have told him all about it; I do not know whether I left that out or not; I could not state—not positively.

Q. You never had possession all that time of the property?

A. Only so far as the deed.

Q. Well, you never lived on it or cultivated it?

A. No, sir.

33 Q. Did you pay taxes on it?

Mr. PATTERSON. March 6, 1870, is the date of the deed from Donahue to Wores, and from Wores back.

Redirect examination:

By Mr. HOLLADAY. Was that the time he told you it had been obtained by fraud—at the time you gave a deed to him and he gave a deed to you back?

A. He told that the first time I saw Mr. Donahue, and also the time the deeds were exchanged.

Q. He told you that the first time you saw him and also the time the deeds were exchanged—on those two occasions?

A. Those two occasions.

Q. How long an interval between the first time he told you and the second?

A. Well, I could not tell exactly; it took perhaps a week or two; I could not say positively.

Q. Did you negotiate with Donahue personally, at the time you got the deed, or did Mr. Halsey do it for you?

A. No; I took Mr. Halsey there to see that the deed was made out correct, and so on.

Q. That was finally when you took Mr. Halsey there?

A. No; I believe I took him there two or three times before the deed was about made out. Some way or another Mr. Donahue or Mr. Sharp were not there, and so I went perhaps three or four times with Mr. Halsey, but I made the arrangement myself with Mr. Donahue.

34 Q. Now, are you not mistaken about the fact of your telling Friedman immediately after you had given up the papers?

A. Well, I say I could not state exactly; but any way, if it was not immediately it was shortly after. I could not state positively; I forget.

The COURT. If you did not tell him immediately, at the time, you told him shortly after?

A. That was what I said. I could not positively, but it was settled business.

Mr. HOLLADAY. How long before you got your deed from Donahue was it that Mr. Friedman went to see Mr. Donahue, at your instance and request?

A. I suppose a long while—several months. I cannot say how much—I have no doubt—because, of course, I did not keep minutes of it.

Q. Was it not about a year?

A. It might be; I could not say positively.

Q. Mr. Friedman was visiting Sharp and Donahue for a number of months?

A. Yes, sir; some time.

Q. And, I understand, trying to negotiate your affairs for you—trying to have you recognized under that paper?

A. Yes, sir.

Q. He was also trying to have his own interests recognized, was he not, at the same time with yours and Loomis'?

Mr. SHARP. I object. Let him state the facts.

The COURT. Ask him what the facts and circumstances were.

35 Mr. HOLLADAY. Had he any other interest at the time to settle with Donahue, at the time he was trying to settle for you?

A. How is that?

Q. Mr. Friedman was trying to get Donahue to recognize your interests under that paper?

A. Yes, sir.

Q. Did he represent anybody besides you?
A. Mr. Loomis.
Q. Anybody else?
A. No; it was eight acres for us both.
Q. Had he not his own?
A. Yes, sir; he had some interests, but I cannot say what interest he had.
Q. Donahue did not charge you with fraud in getting the paper, did he? Was that the first you ever heard about fraud in connection with getting the paper?
A. Yes, sir.

It is conceded that the descriptions in the demands of possession are two:
First. Describing the lands within the blue; and—
Next. The small portion within the green, in the glass-case map.

M. ULLMAN, being sworn as a witness for plaintiff, testified as follows:

I once had an interest in the Belvidere ranch, which I purchased of Henry J. Labatt, who delivered to me several papers, amongst
36 them the above-named paper, signed by Donahue and witnessed by Bixler. I left it once with P. B. Cornwall, a notary public, to get the same acknowledged by Donahue. I afterwards sold the land to Joseph Wores, and delivered to him this paper with my deed.

CHARLES HALSEY, being sworn as a witness for plaintiff, testified as follows:

I am an attorney at law, in practice here for fifteen years past and more. I was counsel for Joseph Wores for an interest claimed by him in the Belvidere ranch, and I had several interviews in relation thereto with defendant, Peter Donahue, and his attorney, Sol. A. Sharp. I had this paper with me at several of these interviews. I saw it first in the hands of Wores or of Friedman, and when the transaction closed and the deed passed, the paper was surrendered to Donahue.

SAMUEL HERMANN, being sworn as a witness for plaintiff, testified:

I was formerly a notary public here, and I had this paper in my possession for the purpose of getting it proved by David Bixler, the subscribing witness, who was then here, having arrived from Virginia City, his place of residence. That was about the year 1867. I was acquainted somewhat with the signature of Peter Donahue, and also with the signature of David Bixler, whose signature was to that paper as a witness.

LAWRENCE H. SHORT, being duly sworn for plaintiff, testified:

37 I am a surveyor, and was engaged as such in the office of the city and county surveyor here for some years. I knew the land in question; have surveyed portions of it April 11, 1863, as appears by my field notes, for the purpose of locating the improvements in the Fleishacker place, the house and adjoining enclosures and fences in that neighborhood. There was a house, a well, a chicken-house, and remains of a shed attached; a fence enclosing a piece of land in grain. I think there were remains of another old fence; it was inside of the exterior boundaries, and a small piece of ground in grain—five acres, I should think. I did not survey the exterior enclosures at that time; they enclosed a large piece of ground, over one hundred acres, I should think. That was a good fence dividing the claims of Fleishbacker and

Seligman. The Seligman claim lay to the east of the Fleishhacker claim; the Crochet claim lay to the north of the Fleishhacker claim; at that time it was supposed to be Chrochet's. Von Schmidt and others had a claim south side of the Fleishhacker claim. I got my instructions to survey from Jarboe, Spencer & Reichert, who were acting as the attorneys for Aaron Fleishhacker; about the same time I was making a survey there for Seligman, and after making the surveys and maps I had both papers at the same time in my possession, and the two surveys were working, to a certain extent, in together. I had the
38 Atsupard claim and other papers belonging to Seligman. I had the DeBrot description and the eighty-acre piece of Mayers, and another piece I found to the south of this. I heard this tract called the Fleishhacker tract, the Belvidere tract, and the Donahue tract; the interior fences inclosed in all about eighteen acres.

It was here admitted that the tenant Evans entered under Gautier at first, and then held as a tenant under Donahue.

JOHN HASTINGS, being sworn as a witness for plaintiff, testified as follows:

I know the Belvidere ranch, in the western addition. I became acquainted with it in 1857, through Dr. Gautier, one of the owners. It had a nice cottage, barn, and was fenced and cultivated; Gautier and others had possession. Gautier had a tenant in it; he kept stock and had a regular farm; he had horses, and I frequently visited the farm with Dr. Gautier from 1857 to 1861; the tenant was there, and remained in 1861. He was an English farmer, and lived there with his family.

GEORGE BLACK, a witness called by plaintiff, sworn, testified as follows:

I am a surveyor; I knew the Belvidere ranch, in 1854, when I surveyed it at the instance of Wainwright & Randall, auctioneers, who were acting for Samuel Fleishhacker, who was living there at the time in a dwelling-house and some out-houses, and a field, twelve or fifteen
39 acres. There were some fences around it; it was inclosed on some sides, as my memory serves me. I made a topographical survey of it, subdivided it into lots and roads throughout, which were offered for sale by Wainright & Randall, at that time. The surveys and maps were made for a public auction and sale of the property, at that time. That map was then exhibited in the warerooms of Wainwright & Randall for some time. I was, at that time, engaged in making surveys of land for public auctions, and made this survey in the ordinary course of my duties as such. Fleishhacker's wife was then living on the tract with him.

LOUIS COHN, called for plaintiff, sworn, examined.

By Mr. HOLLADAY. How long have you lived in San Francisco?

A. Since 1850.

Q. Did you know Samuel Fleishhacker here in early times?

A. Yes, sir; I did.

Q. From what time—up to what time?

A. I knew him from 1850, I think, up to the time of his death.

Q. Did you know of his living out there on the Fleishhacker ranch, ever?

A. Yes, sir.

Q. How long?

A. From 1853 or 1854, I think, he lived there.

40 Q. How long, in all, do you suppose?

A. Two or three years; I do not recollect.
Q. Did you ever visit his house there?
A. I have.
Q. Was he living there with his family?
A. Yes, sir.
Q. How often were you there?
A. I was there twenty or thirty times, I suppose.
Q. Running through all the time that he lived there?
A. Yes.
Q. What improvements had he out there?
A. He had a farm-house, a little garden, a well, chicken-house, and pigs and places for them; nothing more than that, as I recollect.
Q. Any cattle or horses?
A. I think he had some horses there.
Q. Any ground ploughed?
A. There was a small piece ploughed there where he raised some vegetables.
Q. Any fields of grain?
A. I do not recollect whether he had or not.
Q. How much had he possession of out there?
Mr. S. A. SHARP. We object to that; possession is a question of law.
The COURT. It is a question of law; let him state the facts.
A. Well, the house had an enclosure; I do not recollect how many acres, but I understood at that time he bought. After I bought a ranch joining him.
41 Mr. S. A. SHARP. Just state what you know, not what you understood.
A. Well, he had from eighty to one hundred acres.
Mr. HOLLADAY. Was it under fence?
A. A portion of it, I think.
Q. Where was your ranch adjoining him—which way from there?
A. It was on the east, adjoining him.
Q. The same ranch called the Mayers or Seligman?
A. Yes, sir.
Q. What other name did that Fleshhacker ranch go by, if any?
A. The Belvidere ranch.
Q. Did you know Israel E. Woolf when he lived in San Francisco?
A. I did.
Q. Where did he live after that?
A. He went to England, I think.
Q. Where did he go immediately from San Francisco, before he went to England?
A. He went to New York.
Q. Do you know whether he was in St. Louis at any time?
A. Yes, sir.
Q. Do you know where he was about the year 1861?
A. I do not recollect.
Q. Were you agent of Mr. Woolf at any time?
A. I held his power of attorney.
42 Q. Did Mr. Woolf claim any interest in the Belvidere ranch, ever?
Mr. PATTERSON. That we object to. If Mr. Woolf was in possession of any portion of it, that is a fact to be proved.
The COURT, (after discussing.) I sustain the objection. The witness cannot conclude; let him go on and state the facts.

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The COURT, (after discussing.) I sustain the objection. The witness cannot conclude; let him go on and state the facts.

Mr. HOLLADAY. Did you ever see Israel E. Woolf out there in that ranch?

A. Yes, sir.

Q. Did you ever see George H. Davis there?

A. Yes, sir.

Q. In what capacity were they there—only as ordinary visitors?

Mr. PATTERSON. To that we object.

The COURT. Let him just state what they did.

A. They were out there as visitors with me prior to their being owners, and frequently afterwards.

Mr. HOLLADAY. As visitors with you prior to their being owners, and frequently afterwards?

A. Yes, sir.

Mr. S. A. SHARP. I move to strike out what he said about their being owners. The witness did not say that.

Mr. HOLLADAY. How is that about their being owners?

A. After Woolf and Davis had possession of the ranch, or bought the ranch, we went into a hog speculation together—the two ranches—and we frequently had business together out there in reference
43 to this, and in dividing expenses as to fencing and matters of that kind pertaining to the ranch. We sent Mr. Davis to Mexico to buy hogs.

Q. At that time were you occupying the Seligman tract?

A. Yes, sir.

Mr. S. A. SHARP. I object to that as leading.

Mr. PATTERSON. In the first place it is leading, and in the next place it is entirely immaterial.

Mr. HOLLADAY. You say Woolf and Davis had some hogs there?

A. Yes, sir.

Mr. S. A. SHARP. He has not said that yet.

Mr. HOLLADAY. Well, state about the hogs or pigs and all about it, what Woolf and Davis did, whether they had hogs there or not.

Q. I said we went in joint operation to raise hogs there. We sent Mr. Davis to Mexico to purchase them. We kept them in a place adjoining the ranch.

Q. Adjoining the ranch. What I am inquiring about is, if any hogs were kept on the Fleishacker ranch by Woolf and Davis?

A. I do not recollect whether they were kept on his place or ours; but we went into a joint speculation. That is all I recollect about it.

Q. What buildings were then on the Fleishacker land?

A. There was a farm-house and a stable, I think a small shanty. I don't recollect of any other building.

44 Q. Were there any sheds, pig-pens, or corrals?

A. There were sheds there and corrals there, also, and chicken-coops.

Q. Now, with respect to that fact, I will ask you if you remember about those hogs being kept on the Fleishacker ranch?

A. I do not recollect, sir.

Q. Do you recollect whether they were kept on your ranch or Mr. Seligman's or the Mayer ranch?

A. I do not recollect where they were kept. They were there loose.

Q. Mr. Davis went to Mexico and got some hogs?

A. Yes, sir.

Q. Did he bring any from Mexico?

A. He did.

Q. How many?

A. Two or three hundred, I think.
Q. Where did he keep them, out there?
A. Out there.
Mr. PATTERSON. Now, where? You said once he did not keep them on your own ranch. Now, where were they kept?
A. They were either on our place or theirs. I do not recollect which.
Mr. PATTERSON. It was not on either. I know it was there, on another man's place, in point of fact.
Mr. HOLLADAY. Anything to get at the facts. Did Woolf or Davis have any tenants there?
45 Mr. PATTERSON. That we object to, because the lease is the best evidence.
Mr. HOLLADAY. It might have been a verbal lease.
Q. Do you know anything about that?
A. I do not recollect.
Q. What house did Woolf & Davis, or either of them, occupy during that speculation in hogs?
Mr. PATTERSON. I object to that. Let him ask if they occupied any.
Mr. HOLLADAY. I will take it in that shape.
A. They lived in no house there. They lived in the city.
Mr. HOLLADAY. Well, where did Woolf & Davis live during that hog speculation?
A. They lived in the city.
Q. Did they have any help, or did they attend to it themselves?
A. I do not recollect.
Q. Do you remember whether they gave their personal time and attention to it?
A. I do not think they gave their personal time.
Q. You do not remember whether they had any hired men or not?
A. I believe they had some men living at the house.
Q. What house?
A. This Fleishhacker house.
Mr. PATTERSON. You say you believe they had men living out there. Do you know anything about it?
46 A. No, sir; I do not know.

AARON FLEISHHACKER, called for plaintiff, sworn, examined.

By Mr. HOLLADAY. Are you a brother of Samuel Fleshhacker, deceased?
A. Yes. sir.
Q. Did you know him when he used to live out on the track west of the city?
A. Yes, sir.
Q. What was the name of that ranch?
A. Where my brother lived?
Q. Yes, sir.
A. The Belvidere ranch.
Q. How long had he lived there?
A. He lived there from 1853 to 1855.
Q. Was his family there?
A. Yes, sir.
Q. What improvements had he?
A. What improvements? He had a piece of ground cultivated there.
Q. What buildings?
A. He had a good house, what his family lived in; he had a stable and chicken-house.

Q. How much ground had he cultivated?

A. I always thought he had twenty-five acres, what he called twenty-five acres, something near it.

Q. What did you ever see growing upon it?

A. Vegetables—potatoes, cabbages, turnips, salads, and all kinds of vegetables, and a flower-garden.

Q. Did you ever see grain growing there?

47 A. I have seen grain growing there. I don't recollect, but I believe my brother lived there. I was there in 1860, after he lived there. I am not sure whether or not he had grain there when he was living there.

Q. Did he have any fence around the tract?

A. Yes, sir.

Q. How much did that enclose, as near as you can state?

A. Well, my brother always called it one hundred and sixty acres.

Q. What year was that?

A. That was in the year 1853, 1854, and 1855.

Q. Look at that map behind you, (the glass-case map,) and see if that represents the premises you were upon.

A. Yes, sir; that represents it.

Q. Is the house laid down there?

A. Yes, sir.

Q. Is that the house you refer to?

A. It looks like it.

Q. Did you know Israel E. Woolf and George H. Davis?

A. I did know them a little. I never was so intimate with them. I don't know.

Q. Who succeeded to the possession of that lot after your brother left?

Mr. PATTERSON. That we object to.

Mr. HOLLADAY. I mean whom did you see there next after he left?

Mr. PATTERSON. We object to that, because it is asking for a conclusion.

48 Mr. HOLLADAY. Did you ever see anybody on there after your brother left?

A. Yes, sir.

Q. Who was it?

A. I believe his name was Evans; and then, afterwards, I was there again, and there was a milk ranch there.

Q. What was the name?

A. That was in the year 1864 and 1865; I forget the name now.

Cross-examination:

By Mr. PATTERSON. You claim some portion of this land, yourself, do you not?

A. Yes, sir.

Q. You have got a suit for it, have you not, against Mr. Donahue?

A. Yes, sir.

Q. How much do you claim?

A. A half of eighty acres.

JACOB BENJAMIN, called for plaintiff, sworn, examined by—

Mr. HOLLADAY. Did you know Samuel Fleishhacker, in his life-time?

A. Yes, sir.

Q. In 1852, '53, and '54, along there, where did he live?

A. He lived on the ranch outside of the city, called the Fleshhacker ranch, I believe.

Q. Did you visit him there, at any time?

A. Yes, sir.

49 Q. How often?

A. Very frequently, sir.

Q. During a period of how long?

A. Of two or three years.

Q. Was his family with him?

A. Yes, sir.

Q. Describe his improvements, if any he had.

A. He had a dwelling-house and garden, a stable, hogs, chickens, and potato-patch, vegetable-patch, and fence around his land.

Q. He had it fenced in?

A. Yes, sir.

Q. A well?

A. A well; yes.

Q. Had he any enclosure?

A. Yes; he had a large tract enclosed.

Q. To what extent; how many acres?

A. I heard from him it was one hundred and sixty acres.

Q. Had he any interior enclosures, nearer to the house?

A. Yes, sir; there were some enclosures and some improvements.

Q. Were you ever on that land after he left?

A. I may have been there once or twice.

Q. Do you know who was there after him; who succeeded him?

A. I don't know that I remember.

Q. Did you know Woolf and Davis, or either of them?

A. Yes, sir; I knew Woolf and Davis.

50 Q. Did you ever see them there?

A. I don't think that I have ever seen them there. I know that they had constructive possession of it.

Mr. S. A. SHARP. One moment. We object to that.

Mr. HOLLADAY. Did you state whether Samuel Fleshhacker had any horses or cattle?

A. I think he had some horses; yes, sir; and I think some cows; I believe he had cows.

Q. During the year that he was there, was he in any other business?

A. I don't think he was, sir.

Q. Where did he spend his time?

A. He spent it there, as far as I know of.

Q. Did you ever go around that enclosure to see the outer fence?

A. Yes, sir; I went around it.

Cross examination:

By Mr. PATTERSON. When was the last time you was there?

A. Well, it was a few years ago; I rode along the road there.

Q. When did Mr. Fleishhacker leave there?

A. Mr. Fleishhacker left there, I think it was, in 1854 or 1855.

Redirect examination:

Q. (By Mr. HOLLADAY.) Do you know whether he was turned out by the sheriff, when he left there?

A. Yes, sir.

51 Q. In whose favor?

A. In favor of Woolf and Davis, I believe. He claimed it as a homestead, and I believe it was mortgaged to them.

SIMON MAYER, called for plaintiff, sworn, examined:

By Mr. HOLLADAY. Do you know the Fleishhacker tract?

A. Yes, sir.

Q. When did you first become acquainted with it?

A. In 1852, I believe.

Q. Did you own any land near there?

A. Yes, sir.

Q. Where; which way did it lay; east or west, north or south, from the Fleshhacker tract?

A. Well, it is so long since I owned that, I hardly recollect; I think it was north of it; I have not been there since 1853 myself; I have not seen it since.

Q. Whose land is it now; who succeeded that claim?

A. My interest that I had I sold to Mr. Seligman.

Q. Is that the same land that is now called the Seligman ranch?

A. Yes, sir.

Q. Did you know Samuel Fleishhacker's tract personally?

A. I did.

Q. Where did he live?

52 A. Well, he lived sometimes in the city, and sometimes at a ranch out there.

Q. When did he go there first?

A. I believe he went there about 1852—some time in 1852.

Q. How long did he stay there?

A. Well, I don't know; he stayed there considerable time. I do not know how long.

Q. How much considerable time; one year or more?

A. Well, I believe he stayed there one or two years.

Q. Did you ever visit him at his house?

A. I visited him at a house on the ranch, that he had there.

Q. What was the place called, if you remember, at that time, where he lived?

A. At that time it was called the Fleshhacker place.

Q. Did he have any family there?

A. Yes, sir; he was living there with his family.

Q. Did he have any buildings?

A. There was a one-story house there.

Q. Anything else?

A. Yes, sir; there was a hen-house back of it.

Q. Any fences?

A. Yes, sir.

Q. How much?

53 A. The place, as far as I can recollect, was surrounded by brush fences which were then in use.

Q. Any cultivation?

A. There was a flower-garden and a vegetable spot.

Q. Any grain—any plowing?

A. I don't remember any grain.

Q. How often did you visit there?

A. I believe I was there three or four times during 1852. In 1852, I believe I went there two or three times; when I went to my place at that time I used to visit him; that was about two or three times a year.

Q. Now, which was the nearest to town, your place or his?

A. The place I had was a little nearer.

Q. In what direction was that from the city hall here—that land?

A. From the present city hall?

Q. Yes, sir.

A. It would be—well, I would call it about southwest.

Q. Your land then, that Mayer tract—Cohn and Mayer tract—is that what it was called then?

A. Well, it was called the Mayer tract. I don't remember if the name of Cohn was connected with it.

Q. Well, your place was nearer the city than the Fleshhacker tract?

A. Yes, sir.

Q. I will ask you whether your lot and Fleischacker's lot bounded on each other?

54 A. Yes, sir.

Q. What Cohn is that you speak of?

A. Well, the party interested with me at the time was S. T. Mayer.

Q. Who succeeded to your interest—yourself and S. T. Mayer?

A. I sold my undivided half to Seligman.

Q. To whom did the other Mayer sell?

A. I don't know.

Q. What is the nature of that fence described; whether strong, large, small, or weak?

A. Well, it was what was considered, at that time, a pretty good brush fence. There was hardly any other fence known in those times. My impression is it was about four feet high.

Q. Did Fleishhacker keep any stock there?

A. Yes, sir; there was some hogs kept there.

Q. Any horses?

A. Well, he might have kept a few horses.

Q. You say you have not been out there since 1853?

A. I have not been out there since 1853.

Q. So you don't know how long Fleishhacker lived there after that?

A. I do not recollect.

Cross-examination by S. A. Sharp:

The fence you speak of was the fence you built yourself, was it not?

A. Well, we had some report there was some fences there when we bought the land.

Q. You speak of the fences between you and Fleshhacker?

55 A. Yes, sir.

Redirect examination:

By Mr. HOLLADAY. Did you notice how much he had under enclosure—that is, Fleshhacker?

A. Well, it was common report that he had eighty acres. I never went all over his place.

S. A. SHARP. We object to common report. State what you know yourself.

A. Well, that I remember from that time, that it was supposed to be eighty acres. Of course I never measured it.

Mr. HOLLADAY. You say there were some fences there?

A. Yes, sir.

Q. A considerable space appeared to be enclosed?

A. Yes; there was some outside fence, and, of course, interior fences.

Q. Judging from what you saw, together with the report, how would they correspond?

S. A. SHARP. We object to anything about common report.

Mr. HOLLADAY. I will withdraw the question.

S. A. SHARP. Do you mean to be understood to say that there were eighty acres enclosed?

A. I did not say that.

JOSEPH S. FRIEDMAN, called for plaintiff, sworn, examined:

By Mr. HOLLADAY. You are the plaintiff in this suit?

A. I am, sir.

56 Q. State if you made any demand on the defendant Donahue, the defendant Michael McStay, and the other defendants, or any of them, for possession, prior to the commencement of this suit, for the premises in controversy; if so, what, when, and upon whom?

A. I made a demand on John Kelso, February 19th, 1868; he was one of the tenants. I made a demand on the same day, on Michael McStay; I made a demand on Edward Martin the same day, and on James Maguire the same day, and on Michael Hawkins the same day, and on A. D. McDonald on the 7th March, 1868. I served a copy of this on Peter Donahue, February 20th, 1868. I have now mentioned Kelso, McStay, Martin Maguire, Hawkins, McDonald, and Peter Donahue, whom I served February 20th, 1868.

Q. Is that a copy of the paper you served on him? (referring to paper in the hands of witness.)

A. Yes, sir; a copy of it, sir. They are all alike.

Q. You delivered copies to each of them?

A. Each of them a copy.

Q. Did you have any conversations with Donahue besides?

A. I did.

Q. If so, did he say anything about letting you into possession?

A. I asked him if he would let me into possession of my eighty

57 acres of land. I had a gentleman named Michael Dolden with me, and in the presence of this man Mr. Donahue said: "You will have a nice time getting it." That was the remark he made in front of Mr. McLane's office, on California street.

Q. What did you understand that to mean?

A. As much as to say he gave me to understand that I never would get anything of him. He gave me to understand he would law me for it.

Mr. SHARP. We object to that.

Mr. HOLLADAY. Read the paper which you served on him.

Mr. PATTERSON. We object, unless it is considered that the objection we made before is made now. The objection is, that the demand is for possession of the whole premises.

The COURT. I shall make the same decision I made before. I overrule the objection and give you an exception.

Mr. SHARP. We made another objection, that according to the testimony there was no refusal on the part of Mr. Donahue; to say, "You will have a nice time getting it," *it* is not refusing.

To which ruling of the court defendant then and there excepted. (Exception No. 4.)

The COURT. I think if I sent a bill to a man and he made that remark to me, I should take it as a refusal; *it* is sufficient, at all events, to go to the jury.

Mr. HOLLADAY. What else did he say besides?

58 A. Oh, he refused me positively. I went to Mr. McLaine's in the assay office, right above Wells, Fargo's Express, and as soon as I offered the paper he shoved the door against me and put me out, and I heard it barred when I went out. He waited there two hours, and then he came out and he didn't want to take it. He asked, "What is it?" I said, "It is a demand to let me into possession in common with you in that eighty acres." He said, "You will have a nice time before you get it." He took the paper and put it in his pocket and walked off.

Q. What did the other defendants say?

A. The others said they were tenants of Mr. Donahue, and that I should see Mr. Donahue, and that whatever he said they should do.

Q. Did Mr. McStay say that?

A. Yes, sir; as well as Kelso.

Q. This was all prior to the commencement of this suit?

A. Yes, sir.

Q. Referring to the paper you hold in your hand; there are two, I believe, copies, are there?

A. Yes, sir.

Q. That is, the paper you served on the parties were copies of those, were they?

A. Yes, sir; word for word.

Q. Referring to the acknowledgment signed by Peter Donahue and witnessed by David Bixler, mentioned in Labatt's deposition, did you ever have that paper in your possession, the original of that?

59 A. I had it about eight or nine months in my possession, off and on.

Q. From whom did you get it?

A. From Mr. Wores.

Q. Was Wores interested in the land at that time?

A. He was, sir.

Q. Did you ever show that to Peter Donahue?

A. I did.

Q. Did you ever show it to Mr. S. A. Sharp?

A. I did, sir; he was the first man that saw it; he wanted me to keep it out of the way, and show it to nobody.

The COURT. That testimony is all in.

Mr. SHARP. It is all in on stipulation, on file, that any testimony taken on former trial may be read in evidence.

Mr. HOLLADAY. What did Mr. Donahue say; did he object to that as his signature?

Mr. SHARP. We object to that.

The COURT. It is in evidence.

Mr. HOLLADAY. I assure your honor that it is not.

The COURT. Go on, then.

Mr. SHARP. We object to it as leading.

Mr. HOLLADAY. I will withdraw that question, then.

Q. What occurred, with reference to that paper, between yourself and Peter Donahue?

Mr. SHARP. I object to this, because it is already in evidence by the stipulation, and it is stipulated here to consider it in evidence.

60 Mr. HOLLADAY. I suppose your statement then is about as correct as you could make it now, is it not, Mr. Friedman?

A. I suppose so.

[Mr. Sharp reads from the testimony of Mr. Friedman taken at the first trial.]

Mr. HOLLADAY. That testimony is not in by the stipulation.

Mr. SHARP. Yes, sir; the stipulation covers both trials; it says, "on the last and former trial."

Mr. HOLLADAY. No; I have not signed such a stipulation. It was "the last former trial."

Mr. SHARP. I merely make this objection to save time, because I think Mr. Friedman's statement would be the same now as it was then; we will show the stipulation.

JOSEPH S. FRIEDMAN, the plaintiff, called for plaintiff, sworn, examined:

By Mr. HOLLADAY. You are the plaintiff in this suit, I believe?

A. I am, sir.

Q. Referring to this copy of a paper signed by Peter Donahue, in whose handwriting is that?

A. The copy is mine.

Q. When was it made?

A. It was made three years and a half ago; may be a few months more or less.

Q. State if that is a true copy.

A. It is; it is a true copy, word for word, from the original.

61 Q. Where did you get the original for making that?

A. Mr. Wores took it out of his safe, and for safety I carried it to Mr. Samuel Hermann, notary public, in the presence of Mr. Wores, to get it acknowledged; but the time I made the remark to Mr. Hermann, I says, "Here is a copy of that Mr. Donahue has acknowledged to me in my presence; that is a true copy." He remarked to me, "I can't acknowledge it unless I get Mr. Bixler, the subscribing witness; you are not a subscribing witness, and I can't acknowledge it for you." His son was there, and he remarked that he is in town now; and he said if I would leave the paper with him I will get it acknowledged.

S. A. SHARP. You told Mr. Hermann that you wanted it acknowledged, and that Mr. Donahue had acknowledged it to you?

A. Mr. Donahue acknowledged it to me, sir, that he had given that paper, in the office of Mr. Sol. A. Sharp.

The COURT. Did you have the original paper there?

A. I had the original papers in my possession at that time.

Q. He saw it there?

A. The original papers, yes, sir; in the office of Mr. Sol. A. Sharp.

Q. He acknowledged that the paper was his?

A. He acknowledged that it was his paper; yes, sir.

62 Mr. HOLLADAY. That was before you took it to Mr. Hermann's office?

A. Yes, sir; Mr. Hermann told me that he could not acknowledge it without Mr. Bixler, the subscribing witness, and he kept it a couple of days. Mr. Bixler was the subscribing witness.

Q. (Interrupting.) Before you took it to Mr. Hermann's to get it acknowledged by the subscribing witness, you had also shown it to Mr. Donahue?

A. To Mr. Donahue, yes; and Sol. A. Sharp; in Mr. Sol. A. Sharp's office.

Q. When Mr. Donahue recognized it as his signature, did you make any purchase of any interest in this land?

A. I did.

Q. Subsequent to that?

A. I purchased five acres.

Q. Subsequent to this conversation with Mr. Donahue?

A. When I carried that paper over to Mr. Hermann I had five acres in it, but afterward I bought the other interests.

Q. What five acres is that?

A. Five acres that I bought from Mr. James Rice.

Mr. PATTERSON. We object to that; of his having made another purchase.

Mr. HOLLADAY. It is to show that he had an interest in the preservation of that paper.

63 The COURT. It is not material whether he had an interest or not. All you want is the ultimate fact that he did do it.

Mr. HOLLADAY. It is only as to his motive in so doing; that is all.

The COURT. It might be proper on cross-examination to show that.

Mr. PATTERSON. We object to what he did in reference to the land or acquiring any interest in the land subsequent to the date of the paper.

The COURT. They have a right to show title in themselves, most certainly.

To which ruling of the court defendant then and there excepted. (Exception No. 5.)

Mr. HOLLADAY. Did you purchase any interest subsequent to that in this ranch?

A. I did.

S. A. SHARP, (at the same time.) We object to that question as leading.

The COURT. Ask how he purchased.

Mr. HOLLADAY. Well, from whom did you purchase?

The COURT. The deeds are put in evidence, are they not?

Mr. HOLLADAY. The deeds are in evidence.

The COURT. Well, that is far better than to have him swear to it.

Mr. HOLLADAY. Referring to the Holmes deed to you for a sixth, how did you come to make that purchase?

A. I purchased it on the strength of that paper.

64 Mr. SOL. A. SHARP. The deed shows when the purchase was made, and we object to his motives as immaterial and irrelevant.

The COURT. I don't think that is material.

Mr. HOLLADAY. I will refer you to the deed from Woolf, Grey, and Brandon to you; how happened you to make that purchase?

Mr. S. A. SHARP. We object.

The COURT. It is not material how he happened to make it.

Mr. HOLLADAY. I want to show, in addition, that he relied upon that paper.

The COURT. That is a matter of argument.

Mr. HOLLADAY. What was the occasion of that interview with Mr. Donahue—one moment; had you seen Mr. Donahue with that paper present at any time prior to that purchase from Mr. Holmes, and from Woolf, Grey, and Brandon, respectively?

A. I did. I had two or three interviews with him. The first time I carried the original paper of which this is a copy. I carried it to the office of Mr. Sol. A. Sharp, attorney for Mr. Donahue.

Q. Wait a moment; who was present at these interviews?

A. The first time, I think, it was Mr. S. A. Sharp alone.

Q. And subsequently?

A. By appointment it was Messrs. Sharp and Donahue.

Q. Was that paper exhibited at that time?

A. It was, sir.

65 Q. This time had you it with you?

A. I had it in my possession.

Q. Where did you get it from?

A. From Mr. Wores.

Q. That was before the date of these deeds—the Holmes deed?

A. Yes, sir; before I purchased.

Mr. PATTERSON, (interrupting.) Ask him where it was. I object to his telling the witness how to testify.

Mr. HOLLADAY. Well, that is all.

No cross-examination.

Mr. PATTERSON. Now we move to strike out that portion of the evidence of the last witness wherein he stated that he told Mr. Hermann.

Mr. HOLLADAY. I don't think it is important what he told Mr. Hermann.

The COURT. Strike it out. It is a mere declaration not in the presence of defendant.

Mr. HOLLADAY. Now I propose to read this paper in evidence.

Mr. PATTERSON. We object to it; there is no proof of delivery.

The COURT. I have passed upon that question once. I held it was not a conveyance of land. It amounts, perhaps, to a declaration of trust; but no more so, perhaps, than if he had written a letter to that effect. It is equivalent to a letter of a party sought to be charged, and it is therefore admissible. If the witness had written a letter stating those same facts, it would be admissible.

66 Mr. PATTERSON. If he had written a letter and d livered it to the person, it would; but if he had kept it in his own desk, we submit that it would not. It is a declaration of his, in his own handwriting, and as such it can go the jury.

Mr. S. A. SHARP. I desire to state our objection formally. We object that there is no proof of the execution or delivery; that it is immaterial and incompetent; and that the proof shows it was obtained by fraud and never was delivered.

The court overrules the objections, and Mr. Sharp excepts.

Mr. SHARP. I make another objection, that it refers to a certain survey, and before putting the paper in evidence they must identify that survey. The witness swears that he never made any such survey as is referred to in the paper.

Mr. HOLLADAY. We will argue that when we go to the jury, and see what they think about it.

Mr. S. A. SHARP. We also object that there is no consideration.

Mr. Holladay, on behalf of the plaintiff, offered and read in evidence the document marked "Plaintiff's Exhibit No. 4," signed by Peter Donahue, dated May 23d, 1861, witnessed by David Bixler, of which document the following is a copy:

"I, Peter Donahue, of the city and county of San Francisco, State of California, hereby acknowledge for myself, my heirs and as-

67 signs, that on the 10th day of December, A. D. 1857, Israel E. Woolf, now of St. Louis, in the State of Missouri, was entitled to an interest of an undivided one-half part of a certain parcel of land situate in the city and county of San Francisco, containing (80) eighty acres, being the easter'most part of the tract of land known as the Belvidere Rancho, according to the survey of V. Wackenreuder, in October, 1858, and that if the said Woolf has not conveyed such interest or any part thereof, is still entitled to the same. This instrument being an acknowledgement only and not a covenant of any kind whatever.

"Witness my hand this 23d day of May, 1861.

"PETER DONAHUE.

"Witness:

"DAVID BIXLER."

Defendants objected to the introduction of the paper marked Plaintiff's Exhibit No. 4, signed by Peter Donahue, and dated May 23d, 1861, on the ground that there is no proof of the execution or delivery of the paper; that it is immaterial and incompetent, and the proof shows that it was obtained by fraud and never was delivered; that it refers to a certain survey which the proof shows never was made.

The COURT. I have passed upon that question once. I held it not a conveyance of land; it amounts, perhaps, to a declaration of trust, but no more so, perhaps, than if he had written a letter to that effect. It is
68 equivalent to a letter of a party sought to be charged, and is therefore admissible. The paper was read in evidence and marked Plaintiff's Exhibit 4 or 14. To which ruling of the court, defendants then and there excepted. (Exception No. 6.)

V. Wackenreuder, being called as a witness for plaintiff, being duly sworn, testified as follows:

I am a surveyor and draughtsman; this map I made from my own field-notes and other surveys; this map in the glass frame shows the land as surveyed by me in 1857, for Doctor Gautier, and it had the same boundaries in 1861, when I surveyed it for Peter Donahue. (This map was here identified as the "glass-case map," made by V. Wackenreuder, in July, 1871, which map accompanies org. trans.) When I first surveyed this land there was an exterior post and board fence around it; around the entire tract, containing 136½ acres, identical with the scarlet or red lines on this map; there were several interior enclosures which appear on this map, indicated by the small zigzag lines; there was a house on it with some little sheds around; there were eight or ten acres sown in oats and barley, that is in 1857; I made but one survey of that ranch for Dr. Gautier which was in 1857; the next survey I made was in 1861, for Peter Donahue, about the first of June, I believe; at the time I made this second survey the condition of the ranch was about in
69 the same state as in 1857, as to buildings and improvements. I did not take exact notice what was sown the last time. In 1857, when I surveyed for Dr. Gautier, some twelve to fifteen acres were enclosed by this interior fence. In 1857 I found a man by the name of Evans in possession of the tract, as the tenant of Dr. Gautier. The land described in the complaint is marked on this map with lines of pink —red ink—enclosed in pink or carmine lines. I made a map for Mr. Langley, published in his city directory for the year 1862; (one of which books with the map therein being shown to witness, he says:) The survey I made for Dr. Gautier in 1857 and for Peter Donahue in 1861 appear on this map. (Insert map marked Plaintiff's Exhibit 1.) The two surveys correspond in every particular. (Here the witness identifies the tract in question, marked on said map by a round pencil mark at each corner, with "Dr. Gautier" printed therein.) The interior lines indicate the fences around the improvements. The Fleishhacker house is located on this glass-case map. In 1857 I went around the entire tract; it was then known as the Fleishhacker tract and the Belvidere ranch. I never made any survey of the land in 1858.

Ex. No. 1 of no consequence. Sharp & Lloyd, attys. for applt., Holladay for respdt.

On cross-examination by defendant, this witness testified:

When I made the Gautier survey, Dr. Gautier was with me and pointed out the boundaries to me. I surveyed it under his direction. (The defendant's diagram, Exhibit No. 1, being shown witness, he says
70 it is substantially the same as this glass-case map, as to this 136-acre tract.) Thirty-four and three-tenths acres of the DeBrot tract lie inside the land described in the complaint.

Redirect examination:

At the time I made the first survey I had no document to go by. Dr. Gautier showed me one. Of course I was familiar with the place the second time. There are $24\frac{33}{100}$ acres of the eighty-acre tract in blue within the land described in the complaint, exclusive of the $34\frac{3}{10}$ of the

DeBrot tract, in the green lines. The glass-case map represents the various plats made by me from my surveys and field-notes, including some later surveys. The quantity of each of these angles is correctly represented in the figure of this traced copy of the map. It is represented in three separate parcels, Nos. 1, 2, and 3. Number 1 has $34\frac{30}{100}$ acres; number 2 has $8\frac{57}{100}$ acres; and number 3 has $15\frac{66}{100}$ acres. The lines represented in pink describe the land in the complaint, and show on this map the tract, and nearly identical with the official map and surveys of Potter & Humphreys. The plan and survey from the records of liber B, miscellaneous, page 292, appears on the map as the 80-acre piece, and is defined in the glass case map by the blue lines, forty chains one way by twenty chains the other.

(Defendants objected to the introduction of the plan and notes of the above-mentioned survey made by Robert B. Hays, and recorded
71 in liber B of miscellaneous records, page 292, on the grounds that it is immaterial and unauthorized, and incompetent to prove that such a survey was made.)

The court overruled the said objections, and the defendants then and there excepted. (Exception No. 7.)

The deed from Samuel Fleishhacker to George H. Davis and Israel E. Woolf, recorded in liber one of covenants, page 350, means the land in the blue lines, formerly the Fleishhacker tract.

(Defendants objected to the introduction in evidence by plaintiff of the above-mentioned deed from Fleischhacker to Woolf and Davis, on the ground that the law does not allow a certified copy of such a record to be made evidence, and on the further ground, it purports to have been executed by the three, and is only executed by the one.)

The recital, as well as the deed, refers to a former survey and a new survey mentioned in this instrument, and then says that the lines of the first survey were incorrect, and the new survey is correct, and then goes on and purports to grant, on the part of Fleishhacker, an undivided third part, etc. It was not a paper, evidently, from the face of it, designed to have any force until the three executed it, and it is only executed by Fleishhacker.

The court overruled the objection of defendants, to which ruling of the court defendants then and there excepted. (Exception No. 8.)
72 The deed from Woolf and Davis to Fleishhacker, dated July 23d, 1853, acknowledged same day, and recorded same day in liber 26 of deeds, page 248, describes the land within the green lines.

Defendants objected to the introduction of the above deed from Woolf and Davis to Fleishhacker, on the grounds that it is immaterial and incompetent, that the lines do not meet, and it does not inclose any land.

The court overruled the objection, to which ruling of the court defendants then and there excepted. (Exception No. 9.)

The mortgage from Fleishhacker to Woolf and Davis, acknowledged July 23d, 1853, and recorded liber 9 of mortgages, page 451, describes the land in green lines.

The complaint, summons, answer, decree of foreclosure, in the case of Woolf and Davis against Fleishhacker, No. 4068 in the fourth district court, were then read in evidence.

Defendants objected to the introduction in evidence by plaintiff, the foreclosure proceedings in the above case, on the ground that there was no judgment-roll. The court overruled defendant's objection, to which ruling of the court defendants then and there excepted. (Exception No. 10.)

The witness continues: The deed from Sheriff Gorham to Woolf and

Davis, dated December 30th, 1854, acknowledged January 30th,
73 1855, and recorded February 1st, 1855, in liber 50 of deeds, page 379, is the same land described in the green lines.

Defendants objected to the plaintiff introducing the above deed in evidence, on the ground that it does not enclose the premises, and that it does not accord with the decree.

The court overruled the defendants' objection; to which ruling of the court defendants then and there excepted. (Exception No. 11.)

The deed from Davis to Labatt and Cardoza, dated January 13th, 1855, and recorded October 29th, 1855, in liber 55 of deeds, page 470, is the same land described in the green lines.

The deed from Cardoza and wife to Gautier, dated October 9th, 1856, and recorded November 11th, 1856, in liber 64 of deeds, page 227, describes the land in the green lines.

Defendants objected to the introduction in evidence by plaintiff of the above deed from Cardoza et al. to Gautier, on the ground that the last deed appears to have been made to a femme sole, and because there is no proof that Rachel I. Cardoza, in the deed previously offered, is the same person as the one mentioned in the deed from Rachel N. Cardoza, one being a femme sole, and the other a femme covert with different initials. This deed is signed I. N. Cardoza and Rachel N. Cardoza. The court overrules the objection; to which ruling of the court defendants then and there excepted. (Exception No. 12.)

74 The deed from Labatt to Gautier, dated December 10th, 1857, and recorded December 14th, 1857, in liber 73 of deeds, page 329, describes the same land in the green lines.

The deed from L. P. Gautier to Donahue, dated May 23d, 1861, and recorded May 31st, 1861, in liber 131 of deeds, page 540, describes the following premises: "Beginning at the northeast corner of the red lines on the glass-case map." That deed includes all within the red lines on this map, and more too, and 160 acres besides. It excepts the lands in the green lines, as I understand it; it excepts an undivided half-part of the green piece, and excepts an undivided one-third of one-half of the green lines. The exceptions are confined to the easterly portion of the land.

Mr. Holladay reads the description and exceptions contained in the deed. (Gautier to Donahue.)

Q. Do you know what land it refers to?

A. That refers to the green lines.

Q. Look at that deed from L. P. Gautier to Joseph S. Friedman, dated and acknowledged March 2d, 1867, and recorded same day in 361 of deeds, page 92, and say what it describes.

A. It describes two parcels of land; it includes all the land, 296 acres; it includes all in the green lines.

Defendants objected to plaintiff introducing in evidence the above deed from Gautier to Friedman on the ground that it is irrel-
75 evant and immaterial, and that Gautier had already before this deed conveyed all he had to Mr. Donahue and to Mr. Holmes, as appears by the deeds offered by plaintiff.

The court overruled the objection of defendant, to which ruling of the court defendant then and there excepted. (Exception No. 13.)

Mr. Holladay, on behalf of plaintiff, introduced the power of attorney from Woolf to Brandon, dated and acknowledged November 15th, 1867, and recorded January 20, 1868, in liber 23 of powers of attorney, page 349. Considered as read in evidence.

Q. Look at that deed shown you, from I. E. Woolf, by his attorney,

Brandon, C. V. Grey, and J. R. Brandon, to Joseph S. Friedman, dated, acknowledged, and recorded January 20, 1868, recorded in liber 416 of deeds, page 18. What land does it describe?

A. I understand it contains a description of the land, first in the blue, and next in the green. The first piece in the blue lines, 20 chains by 40 chains, and the next piece in the green lines, 80 acres, the De Brot tract.

Cross-examination:

By Mr. SHARP. What is the quantity in the blue lines, outside the Belvidere?

A. 21 45-100 acres.

Q. How much land is inside the blue lines described in the complaint?

A. 58 53-100 acres; all the balance.

76 Q. You don't understand me; give me the quantity of the piece of land here? (Showing.)

A. This is 15 $\frac{66}{100}$ acres.

Q. That is outside of the De Brot claim, and inside the 80-acre tract?

A. Yes, sir.

Q. Who made that map?

A. I made the map from my field-notes of original surveys, and from other surveys.

Q. Does the eighty acres in blue correspond in this map with the eighty acres in blue on the other map?

A. Very nearly, substantially; exactly, because I used the other map in constructing this map.

Plaintiff offered a deed from L. P. Gautier to Isaac E. Holmes, dated December 29, 1857, acknowledged the same day, recorded Sept. 15th, 1860; party of the first part in consideration of the sum of $1,000 remises, releases, and quitclaims to the party of the second part all his right, title and interest in and to one-third of an undivided one-half of all that piece or parcel of land situated in the city and county of San Francisco, bounded and described as follows: commencing at the southeast corner of an 80-acre lot of land belonging now or lately to Luzard Atsupard; thence running N. 52 deg. 30 min. W., 16 chains and 4 links; thence S. 48 deg. and 35 min. W., 4 chains and 9 links; thence N. 41 deg.

77 W., 74 chains and 65 links; thence S. 40 deg. 40 min. W., 8 chains and 50 links; thence S. 43 deg. E., 74 chains and 65 links; thence S. 41 deg. 15 min. E., 10 chains and 27 links; thence N. 60 deg. E., 6 chains and 93 links; thence N. 56 deg. 50 min. E., 2 chains and 48 links; thence N. 65 deg. 30 min. E., 6 chains and 24 links, to the place of beginning.

It was conceded by defendants that the descriptions in the demand of possession are two: first, describing the land within the blue lines and next, the land within the green lines on the glazed case map.

Here the plaintiff rested.

Mr. Patterson, on behalf of defendants, then and there moved for a nonsuit against the plaintiff, on the ground that the plaintiff has shown no title distinguished from possession, and that he has shown no possession within the period of five years next before the commencement of this action, nor any deraignment of title from any person showing any possession within that period, and also on the further grounds:

I. That the plaintiff has shown himself to be barred by the statute of limitations.

II. The plaintiff claims as a tenant in common, and the evidence shows that he is not and cannot be a tenant in common of any portion of the premises sued for, with the defendants or either of them.

And that the evidence shows that the title passed to the defend-
78 ants by virtue of the act of Congress of March 8th, 1866, and also upon the ground that the title was vested in defendants by the act of 1866, and the act of the legislature confirming order eight hundred, which motion the court, after argument, overruled, to which ruling of the court defendants then and there excepted. (Exception No. 14.)

Testimony for defendants.

The defendants, to maintain the issues on their part, offered and read the following evidence, viz:

A deed from Samuel Fleishhacker to Aaron Fleishhacker, dated October 6th, 1853, acknowledged and recorded the same day in liber 35 of deeds, page 78.

Defendants next read in evidence a power of attorney from Israel E. Woolf and Annie, his wife, to Lewis Cohn, dated October 5th, 1860, acknowledged same day, recorded Sept. 14th, 1861, in liber 11 of powers, page 544, authorizing him to convey real estate.

Also a deed from Israel E. Woolf, by his attorney, Lewis Cohn, to Henry J. Labatt, dated and acknowledged February 6th, 1861, recorded September 3, 1862, in liber 182 of deeds, page 288. The party of the first part, in consideration of the sum of $700, remises, releases,
79 and quitclaims unto the party of the second part all the undivided one-half of that certain piece or parcel of land situate, lying, and being in the city and county of San Francisco, bounded and described as follows: Commencing at the southeast corner of eighty-acre lot belonging, now or lately, to Luzard Atsupard; thence running north 52 deg. 30 min. west, 16 chains 4 links; thence south, 48 deg. 35 min. west, 4 chains 9 links; thence north 43 deg. west, 74 chains 65 links; thence south 40 deg. 40 min. west, 8 chains 50 links; thence south 43 deg. east, 74 chains 65 links; thence south, 41 deg. 15 min. east, 10 chains 27 links; thence north 60 deg. east, 6 chains 93 links; thence north 56 deg. 50 min. east, 2 chains 48 links; thence north 65 deg. 30 min. east, 6 chains 24 links, to the place of beginning; containing 80 acres of land, more or less, together with the buildings and improvements thereon.

Mr. PATTERSON. Now, it appears from the evidence introduced by the plaintiff, that Israel E. Woolf never pretended to have vested in him but one undivided half of this tract of land. This deed conveys that undivided half, and is of a date anterior to the pretended instrument signed by Donahue, of May 23d, 1861, viz: On the 6th day of February, 1861; so that that instrument of May 23d, 1861, wherein it purports to recognize the fact that Israel E. Woolf had in 1857, and yet has it, if he had
80 not already conveyed an interest, is not, as we deem, proper evidence, because it now appears that he had already conveyed, and therefore we move to strike out that instrument.

The COURT. The proper course would be to go and make out your case and then argue as to the effect of it afterward. They might, in rebuttal, propose to show that he re-conveyed to them.

Mr. PATTERSON. We reserve an exception. (Exception No. 15.)

Defendants next offered in evidence a deed from Henry J. Labatt to Philip Lewis, dated Feb. 26th, 1861, acknowledged May 28th, 1861, recorded May 29th, 1861, in liber 175 of deeds, page 254. This deed purports to convey one undivided fifth of half of the DeBrot tract.

Defendants also offered and read in evidence a deed from Henry J.

Labatt to Maurice Ullman and William E. Loomis, dated November 26th, 1862, acknowledged Dec. 3d, 1872, recorded in same day in liber 182 of deeds, page 291. The party of the first part, in consideration of $1,500, grants, bargains, sells, aliens, remises, releases, conveys, and confirms unto the parties of the second part, all that certain undivided eighty acres, being the undivided half of two-fifths of the undivided one-half of that certain piece or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, and bounded and described as follows: Commencing at the southeast corner of eighty-acre lot belonging to Luzard Atsupard in 1849, thence running north 52 deg. 30 min. west, 16 chains 4 links; thence south 48 deg. 35
81 min. west, 4 chains 9 links; thence north 43 deg. west, 74 chains 65 links; thence south 40 deg. 40 min. west, 8 chains 15 links; thence south 43 deg. east, 74 chains 65 links; thence south 41 deg. 15 min. east, 10 chains 27 links; thence north 60 deg. east, 6 chains 93 links; thence north 56 deg. 50 min. east, 2 chains 48 links; thence north 65 deg. 30 min. east, 6 chains 24 links, to the place of beginning; containing in all eighty acres, more or less.

Defendants next offered and read in evidence a deed from Geo. H. Davis and Israel E. Woolf to Samuel Fleishacker, dated July 23d, 1853, acknowledged and recorded the same day in liber 26 of deeds, page 247, describing the premises within the green lines.

Defendants next offered and read in evidence a deed from Maurice Ullmann to Joseph Wores, dated May 5th, 1864, acknowledged May 6th, 1864, recorded same day in liber 238 of deeds, page 381, describing the piece of land within the DeBrot tract, represented on the map in green.

Party of the first part, in consideration of the sum of $1,000, grants, bargain, sells, conveys, and confirms unto the party of the second part all the undivided one-half of one undivided fifth of the undivided half of all that certain tract of land situate in said city and county, and described as follows, viz:

Commencing at the southeast corner of a parcel of land formerly owned by or in possession of Luzard Atsupard; thence running
82 N. 52 deg. 39 min. W., 16 chains 4 links; S. 48 deg. 35 min. W., 4 chains 90 links; thence N. 43 deg. W., 74 chains 65 links; thence S. 40 deg. 40 min. W., 8 chains 50 links; thence S. 43 deg. E., 74 chains 65 links; thence S. 41 deg. 15 min. E., 10 chains 27 links; thence N. 60 deg. E., 6 chains 93 links; thence N. 56 deg. 50 min. E., 2 chains 48 links; thence N. 65 deg. 30 min. E., 6 chains 24 links, and to the place of beginning, containing 80 acres, the property hereby intended to be conveyed being equivalent to four acres.

Defendants offered in evidence, next, a deed from Joseph Wores to Peter D nahue, dated March 12th, 1867, acknowledged March 13th, 1867, recorded March 14th, 1867, in liber 361 of deeds, page 249.

The party of the first part, in consideration of the sum of five dollars, remises, releases, and quit-claims unto the party of the second part all his right, title, and interest in and to that certain tract of land, situate and being in the city and county of San Francisco, and bounded and described as follows, viz:

Beginning at the southwesterly corner of the Seligman and Mayer tract, in the SE. quarter of section 7, T. 2 S., R. 5 W., 45.38 chains due E., and 18.45 chains due N. of post set for the SW. corner of section 7; thence N. 34 deg. W., 40 chains; thence S. 56 deg. W., 20 chains; thence S. 34 deg. E., 40 chains; thence N. 56 E., 20 chains, to place of beginning, containing 80 acres.

83 Defendants next introduced in evidence a diagram made by Wm. Humphreys, of the Belvidere ranch, of the eighty-acre tract

and of the 160-acre tract, and of the 136-acre tract, included in the Donahue fence, but has not the De Brot tract plotted in it, marked Ex. No. 10.

Defendants next offered and read in evidence a deed from Wm. E. Loomis to Peter Donahue, dated March 12th, 1867, acknowledged March 13th, 1867, recorded March 14th, 1867, in liber 361 of deeds, page 247. The party of the first part, in consideration of the sum of $5, remises, releases, and quit-claims to the party of the second part all his right, title, and interest in and to that certain tract of land situate, lying, and being in the city and county of San Francisco, and bounded and described as follows: Commencing at the southwesterly corner of the Seligman and Mayer tract, in the southeast quarter of section 7, T. 2 S., R. 5 W., 45.38 chains due east and 18.45 chains due north of post set for the SW. corner of section 7; thence N. 34 deg. west, 40 chains; thence S. 56 deg. west, 20 chains; thence S. 34 deg. E., 40 chains; thence N. 56 deg. E., 20 chains, to the place of beginning; containing 80 acres.

Also a deed from Isaac E. Holmes, of Charleston, South Carolina, to Madam E. Parain, dated Oct. 1st, 1860, acknowledged January 22d, 1861, recorded January 24th, 1861, in liber 124 of deeds, page 61. The party of the first part, in consideration of the sum of six hundred
84 dollars, remises, releases, and quit-claims to the party of the second part all his right, title, and interest in and to three acres of land contained and embraced in one-third of an undivided half of that piece or parcel of land situate in the city and county of San Francisco, bounded and described as follows, being in the DeBrot tract, within the green lines:

Commencing at the southeast corner of an eighty-acre lot of land belonging now, or lately, to Luzard Atsupard; thence running N. 52 deg. 30 min. W., 16 chains and 4 links; thence S. 48 deg. 35 min. W., 4 chains and 9 links; thence N. 43 deg. W., 74 chains and 65 links; thence S. 40 deg. 40 min. W., 80 chains and 50 links; thence S. 43 deg. E., 74 chains and 65 links; thence S. 41 deg. 15 min. E., 10 chains and 27 links; thence N. 60 deg. E., 6 chains and 93 links; thence N. 56 deg. 50 E., 2 chains and 48 links; thence N. 65 deg. 30 min. E., 6 chains and 24 links, to the place of beginning.

Also a deed from Madam E. Parain to Peter Donahue, dated February 27th, 1864, acknowledged and recorded same day, in liber 234 of deeds, page 196. Party of the first part, in consideration of $300, grants, bargains, and sells, conveys and confirms unto the said party of the second part, all her right, title, and interest in and to three acres of land contained and embraced in one-third of an undivided one-
85 half of that piece or parcel of land situated in the city and county of San Francisco, State of California, bounded and described as follows: Commencing at the southeast corner of an eighty-acre lot of land belonging now, or lately, to Luzard Atsupard; thence running N. 52 deg. 35 min. W., 6 chains and 4 links; thence S. 48 deg. 35 min. W., 4 chains and 9 links; thence N. 43 deg. W., 74 chains and 65 links; thence S. 40 deg. W., (8 chains) and 50 links; thence S. 43 deg. E., 74 chains and 65 links; thence S. 41 deg. 15 min. E., 10 chains 27 links; thence N. 60 deg. E., 6 chains 93 links; thence N. 56 deg. 50 min. E., 2 chains 48 links; thence N. 65 deg. 30 min. E., 6 chains 24 links, to the place of beginning; known as the "Fleishacker or Gautier ranch."

Also, a deed from A. D. Moulton, John Treat, John Sproul, and Andrew Thompson, to Peter Donahue, dated August 27, 1861, acknowl-

edged same day, and recorded August 28th, 1861, in liber 138 of deeds, page 199.

Defendants introduced next in evidence the diagram made by Wackenreuder, marked "Defendants' Diagram No. 1."

Also, a diagram of showing DeBrot tract, Luzard Atsupard tract, and Donahue tract, marked "Defendants' Ex. No. 2."

Peter Donahue, one of the defendants, called on behalf of the defence, being duly sworn, testified as follows:

Mr. HOLLADAY, (for plaintiff.) I shall propose to the court to
86 have the defendants' other witnesses excluded from the court-room during the time these possessory interests are being investigated. The court has some experience in these possessory cases, and understands the necessity of keeping the witnesses separate.

The witnesses were excluded.

Mr. S. A. SHARP. You are one of the defendants?

A. Yes, sir.

Q. Look at that deed and Exhibit No. 12. (Shown witness.)

The WITNESS. I recognize this; I remember the transaction.

Mr. S. A. SHARP. Who did you find there when you went out?

A. I found in the house John Evans and his wife.

Q. Who else?

A. Well, they were there when I was put in possession of the whole tract. I went around with him, and looked at it, and went to fencing.

Mr. HOLLADAY. I move to strike out "when I was put in possession of the whole tract."

Mr. S. A. SHARP. You say you found Evans and wife in the house; who else did you find there?

A. I found those men there.

Q. Give us the names.

A. Their names are written here, (referring to Exhibit No. 12.)

Q. You mean the grantors in that deed?

A. Moulton, Treat, Sproul, and Thompson.

87 Q. Was there any opposition to building the fence; what did you do when you went there?

A. After I purchased the place was very dilapidated, and I ordered lumber out there for the fence. I had several teams hauling out lumber, and I had fenced a certain portion when these men stopped me.

Mr. HOLLADAY. You say that after you purchased; from whom?

A. From Dr. Gautier and Dr. Hastings.

Mr. S. A. SHARP. After you had got a deed from them you sent lumber out to build a fence?

A. Yes, sir.

Q. And those men stopped you?

A. Yes, sir; I got my leg, my ankle, thrown out. I was laid up in bed for some time. My leg was splintered and I could not go out, and the workmen who were fencing came in and told me they were stopped from work.

Mr. HOLLADAY. I move to strike out that.

The COURT. Strike it out.

WITNESS. I went out. I got a horse and buggy and went out, and took a gentleman with me, Mr. George S. Wright, who happened to be staying there in the room with me conversing. I asked him to ride out.

Mr. S. A. SHARP. What happened when you went out?

A. These men stopped me from fencing.

The COURT. Which men were those?

A. Those men here, Treat, Sproul, Moulton, and Thompson.

88 Q. Those men that executed the deed?

A. Yes, sir; those men stopped me.

Mr. HOLLADAY. They stopped your men?

A. They stopped my men previous to my going out; I had ordered my man to go on and fence; that was my place; they stopped him and would not allow him to.

Mr. S. A. SHARP. What did you do then?

A. I had them arrested.

Q. After you had them arrested what occurred then?

A. I believe I had them arrested for knocking down a fence that I put up, and something or other, and they got out any way; I could not arrest them; they got loose, and the judge told me.

The COURT. They were discharged?

A. They were discharged; the judge told me.

Mr. HOLLADAY. Never mind what the judge told you.

The WITNESS. I went out there again and went to fencing, and my men fenced, and I held on to the posts and forbade them to knock them down, and they knocked it right down before me, and I had them arrested again, and brought them in court, and previous to the trial came off we compromised; they had a shed built.

Q. They had a house built?

A. They had a house built; a shed built on another part of the ranch, and a man sleeping in it, with a bed and a gun; and I compromised with them and paid them something.

89 Mr. HOLLADAY. You bought them off?

A. I bought them off.

Mr. S. A. SHARP. And they gave you a deed?

A. Yes, sir.

Q. Had you any person upon the premises prior to this, remaining there, representing you?

A. I had Mr. Evans and wife.

Q. Had they taken a lease from you before that time?

A. I forget the date of the lease; they did take a lease from me, but they acknowledged Dr. Gautier and Hastings, and he took me there with him and the broker from whom I purchased.

Q. I show you, in this connection, a lease from Peter Donahue to John Evans, dated Aug. 3, 1861.

A. They were my tenants there for several years.

Q. (Reading.) "To hold for the term of two years from the first of August, 1861, to the first of August, 1863;" is that the case?

A. Yes, sir; that is my signature and Evans'; that is my lease to Evans.

Mr. S. A. SHARP. I offer that lease in evidence, dated August 1st, 1861. (Marked Exhibit No. 13.)

Mr. S. A. SHARP. What fencing did you have done on the premises?

A. I spent about $4,000 for the fencing.

Mr. HOLLADAY. That was not the question; I wish that to be stricken out. He says, what fencing did you have done?

90 WITNESS. I fenced with a four-board fence and posts.

Q. Describe on that diagram there, to the jury, how you ran the fence.

A. (Referring to diagram, Exhibit No. 10.) I fenced all along there from the corner; I wanted to fence in the whole tract that I had bought from Gautier and Hastings; at that time the land was away out, and was not valued at much; and I calculated to fence out the whole tract

where Sproul was, and ran it by the line; here is the house I built afterwards, (showing) the Evans house, (pointing to what is know' as the Fleishacker house;) I fenced out to here, and they stopped me—the same men did; this is the Perley claim in there, and I had some difficulty with them about it, but they stopped me. On the south line of the 136-acre tract they stopped me, and I went back and fenced the east line up there of the 136-acre tract; and thus fenced up there and here; we had a difficulty; I fenced from the east to the west line; here is where I had the men arrested; I had them arrested twice.

Mr. S. A. SHARP. Where was the house they had?

A. There is where it was located. (The house marked Donahue house.)

Q. And that is part of the same house still?

A. The same lumber is in it, of course. I had carpenters and bricklayers there.

Q. After you got a deed from them, where else did you run your fence?

91 A. I had some difficulty about it with Sproul, and there was a ring of a hog-pen here.

Q. Where did you run the line of fence after you came to this point?

A. I came to this place where they kept a gate open, in the west line of the 136-acre tract. I claimed this under my deed from Gautier.

Q. What year was that?

A. That was about ten or eleven years ago. It was in 1861.

Q. What kind of a fence do you say it was?

A. It was a four-board fence, the same as any other good fence; it was a first-rate fence. The lumber that I put up is there yet.

Q. Would it turn cattle?

A. It would turn cattle or horses, or anything; it was six-inch by one-inch stuff—regular fencing. The fence is there yet, around the place. The place is all fenced in by the same fence to day.

Q. What did the fence cost you?

Mr. HOLLADAY. I object to that as immaterial.

WITNESS. I do not know the amount here now; I don't remember.

The COURT. It is objected to.

Mr. HOLLADAY. He has described the fence.

WITNESS. I don't remember, unless reference to the book at that time.

Mr. S. A. SHARP. Did anybody contribute to building the fence beside yourself?

A. No, sir.

92 Q. Did anybody offer to contribute?

A. No, sir; not a cent.

Q. What other improvements did you make there?

A. Well, I furnished Evans lumber and stuff to fix up the barn; it was nails and everything, and grain; he sowed a tract of land behind the house in oats and stuff.

Q. What year was that in?

A. That was in '63—1862 and '3. I furnished him several things.

Q. Did Evans remain there during the two years?

A. Yes, sir.

Q. Any longer time?

A. He died there; the wife did live there afterward. I went to Europe, but when I came back he was dead. No, he died after I came back, I think. I know he died there; but the wife lived there—Mrs. Evans—many years afterwards.

Q. Who succeeded Mrs. Evans?

A. A man from Milpitas that I rented it to, for a dairy, by the name of McStay.

Q. Was not a man of the name of Nottingham there first?

A. No, Nottingham was not in the house. Nottingham was not in the Evans house. I think it was McStay. Nottingham never lived there.

Q. Whom did McStay enter under?

A. Under a lease from me, and paid me rent.

93 Q. What improvements were made during the time of McStay?

A. There was quite a large barn built, which is there yet. He had a large number of cows and kept a dairy, and the crops that Evans had were not sufficient for his business, and he had to build quite a large barn. It was built in a rough manner, but was pretty large. I have no doubt at all they had 40 or 50 or 60 cows.

Q. Who first occupied the house marked "Donahue House" on that large diagram, No. 10—I mean after you got the deed from Moulton and others?

A. Oh, I have had four or five families in it, one after another.

Q. Has it been empty at any time—I mean, has it been continuously occupied?

A. Continuously occupied. One time it was vacant about three weeks, during which time somebody came and stripped all the locks and everything off of it; robbed the whole house of every bit of iron-work in it. A tenant got out before I knew it, and somebody took all the locks off the doors.

Mr. HOLLADAY. That testimony is inadmissable. It is on a tract of land not in this suit, and I object to it on this ground.

Mr. S. A. SHARP. We are proving possessory acts in the 136-acre tract, which includes all the land in dispute.

94 The COURT. It is testified that the whole tract, including that portion now in litigation, was fenced.

Mr. S. A. SHARP. Yes, sir.

The COURT. And that he claims to have had possession of it by reason of this house occupied by his tenants.

The WITNESS. I bought it.

The COURT. If that is so; if the house didn't happen to be on this particular piece of land, there is no reason why it should not be evidence of possession.

Mr. HOLLADAY. There was a strong fence between them, he says.

The WITNESS. There was no fence between those places at all.

Mr. S. A. SHARP. Was there any fence along this line? (Showing on Exhibit 10.)

Mr. HOLLADAY. I make my objection; it appears to be separate tracts.

Mr. S. A. SHARP. Was there one or two tracts?

A. It was all one tract.

Mr. HOLLADAY. I object to that as incompetent.

The COURT. Strike it out then.

Mr. HOLLADAY. I understand you to say you commenced here, (referring to Exhibit 10,) and stopped there; there was the fence there?

A. Yes, sir; I put one there.

Mr. S. A. SHARP. Did it meet this line-fence here? (showing.)

A. Yes, sir; there was a gateway put in here, but it was torn down.

95 Q. Was there any fence along this line; the line of the 80 acres?

A. No, sir; there was a little fence right down in front of that house; a kind of embankment made of brush and old tin.

Q. Around the Fleishacker place?

A. Yes, sir; when it got down here you had to drive around the milk-house, in place of going right through it; you had to go around the milk-house to get in there. (Referring to Exhibit 10.)

Q. How much of an enclosure was there around the house that you say is the Evans or Fleishacker or the Gautier house?

A. I do not know precisely the extent; but there might be from twelve to fifteen acres.

Mr. HOLLADAY. What improvements were made to this Evans house? Were there any other interior fences from the time you went there until the present time; until this road was opened? Was there any other interior fence than that little inclosure around the Evans house?

Mr. S. A. Sharp, objects as leading.

A. There was no fence only what I put there. I had to fence this up because I had rented this to these people, and they were quarrelling, besides, among themselves. They wanted the whole range.

Q. You fenced along the central macadamized road?

A. I fenced along there and divided the two of them.

Mr. PATTERSON. When was that?

96 A. That must have been six or seven years ago.

Mr. S. A. SHARP. When was the road opened; was it fenced before the road was opened?

A. I fenced it after.

Q. Six or seven years ago?

A. Yes, sir.

Q. What improvements were made upon the Fleishacker or Evans house or Gautier house by you?

A. I overhauled it once; the roof was bad; it was generally dilapidated, and I overhauled it and lined it with wood inside, and repapered it, and fixed it up so that it was tenantable.

Q. Were there any additions made to it?

A. Yes, sir; I think I made—well, I made a large room behind it, which answered for a sort of dairy for keeping milk.

Mr. HOLLADAY. What is the purpose of the testimony concerning improvements? I will admit his possession; I admit he went there and fenced.

The COURT. They are endeavoring to prove by fencing and other acts of possession. If you simply admit the fencing, they might not consider that sufficient.

Mr. S. A. SHARP. State if anybody did any other acts of possession except you, and under you.

A. No, sir.

Q. What animals, if any, were kept there by you and your tenants?

97 A. I had some horses myself, and they had horses and cows and hogs and chickens and hens, lots of them. They used to bring me in eggs to the house, both Mr. and Mrs. Evans, and milk; and McStay always furnished me with milk and butter.

Q. McStay is the same man sued in this action; what is the other name?

A. Michael McStay; he must have had seventy-five or eighty cows, and a lot of hogs.

Q. Where did he keep them?

A. He kept them running around the place; and he kept them up in

the winter-time in the barn. He brought milk into town every morning. His wife and daughter milked, and he drove the milk-wagon, and drove in town.

Q. Do you remember about the time the road was opened?

A. I forget the dates, but we commenced working on it, I think, in 1863; I am not positive about that.

Mr. HOLLADAY. The central road was opened, I think, in 1866.

The WITNESS. I say they commenced work on it in 1863, because they came to my house, the people living back here. Mr. Young, who was recorder, I remember, came to my house. There was no way of getting to the property back here, and they came to my house, and they had it all laid down, and talked about getting the franchise, and I subscribed for two hundred shares. My daughter was sick, and I
98 went East with her, and when I returned I found the road was built, but the contractor was not paid, and there was a good deal of trouble about that, and I had to pay the contractor.

Q. Don't go into those details. You contributed for building the road?

A. Yes, sir; unfortunately I subscribed for stock, and paid for men who did not pay.

Mr. S. A. SHARP. How much expenditure have you put upon the property since 1861?

Mr. HOLLADAY. That is immaterial.

A. About thirty-five or forty thousand dollars, first and last, and everything.

Mr. S. A. SHARP. Prior to the commencement of this action—the 24th day of February, 1868?

A. Well, all the money I expended was prior to that.

The COURT. How much, altogether?

A. I don't know, without referring to the books.

The COURT. About how much?

The WITNESS, (continuing.) Including the road?

Mr. S. A. SHARP. Did anybody contribute any portion of that besides yourself?

A. Not that which I paid.

Q. From the time you went there, in 1861, down to February 24, 1868, for whom did you occupy the land?

A. For myself. I bought it, and improved it, and paid for it.
99 The COURT. I think myself that is objectionable. I sustain the objection. He has testified that he has done all the acts he did for himself, and no one contributed for him. I think you have got an answer to the question.

The WITNESS, (continuing.) Other people contributed to build the road.

Mr. SHARP. Other outside people?

A. Other outside people. They owned lots further out.

Mr. HOLLADAY. Will the court instruct the reporter to strike out what the witness has just stated?

The COURT. Strike out what he said.

Mr. PATTERSON. We save an exception. (Exception No. 16.)

Mr. S. A. SHARP. Whose handwriting is that paper in? (Exhibit No. 15 shown the witness, being the original of plaintiff's Exhibit No. 4.) Compare it and see if it is a copy.

(The court reads the paper.)

Mr. S. A. SHARP. Now, Mr. Donahue, state the circumstances under which that paper—state whose handwriting it is in, first.

A. I believe it to be Mr. Bixler's. I have been informed it was, and I remember a bickering that was going on about this at the time.

Q. Did you ever deliver that paper, or authorize anybody to deliver it, to any person, as a paper from you?

A. I never did.

100 Mr. HOLLADAY. That is incompetent. I object to it. I ask to have it stricken out.

The COURT. Strike it out. Ask him what he did.

Mr. S. A. SHARP. We reserve an exception to that ruling. (Exception No. 16½.)

Q. Just state the circumstances.

A. At the time that it was purchased from Dr. Gautier and Dr. Hastings, I had the usual search made in the records, it being outside lands at that time; and I talked with Mr. John P. Buckley, who bought some adjoining, and who is since dead, and I consulted with him about purchasing this—the broker was offering it to me, and I consulted Mr. Buckley about it, and he advised me to take it to Mr. Casserly.

Q. Buckley advised you?

A. Yes, sir; I took it there, and he turned the matter over to Mr. Bixler to attend to it; Mr. Casserly was busy, and he told me, or somebody told me, I do not remember who, that Labatt had got something, and I went to see Labatt.

Mr. HOLLADAY. Who did?

A. I did, personally. He claimed to know all about these outside lands and everything; and Labatt said something about this man Woolf or De Woolf, whatever his name is. Labatt appeared to be interested in some way or another. I could not tell how, but he claimed or insisted that Woolf and he wanted me to give him some acknowledgment,

101 and there was quite a bickering about it, and I was going to do it; but Bixler, I think, told me not to do it, only on conditions, and finally I agreed to it; and Bixler, if you please, drew this paper and drew another one with—he drew this paper, and I signed it, and, to the best of my judgment and belief, I left it in the office of Mr. Bixler, and never knew it to be given out. I never gave it to any one, and away, months afterwards, I understood this was out—or years after.

Mr. S. A. SHARP. Bixler drew another paper?

A. He said he would, and I saw the copy of it.

Mr. HOLLADAY. I object to that.

Mr. S. A. SHARP. Was the other paper ever executed?

A. I never knew it. I didn't know that I had.

Q. Who was the other paper to be executed by?

The COURT. What paper does counsel refer to?

The WITNESS. This was drawn by Mr. Bixler.

Mr. S. A. SHARP. The witness states that when that paper was drawn it was drawn by Bixler; and there was some bickering about signing the paper——

The WITNESS, (interrupting.) About giving Labatt any paper until another was signed that Bixler said he would draw. He did draw it, and he showed a draft of it. I asked who was to execute the other paper. I never gave this paper to any one. I signed it, and left it with Mr. Bixler.

102 Mr. S. A. SHARP. Who was the other paper to be executed by?

A. It was to be executed by the man who wanted this one—Labatt.

The COURT. This paper was considered on the last trial to be left in escrow for the performance of some other act.

Mr. HOLLADAY. The notes of the evidence do not indicate that.

Mr. SHARP. That is what we wish to show.

The WITNESS. This was left with Mr. Bixler; I never gave it to anyone; Bixler was my attorney in the matter.

Mr. SHARP. Was the other paper ever executed?

A. Not to my knowledge; I never saw it; this was left with Mr. Bixler; I saw the copy of the other in pencil.

Q. The other paper to be executed?

A. Yes, sir; I was by, sitting beside him, when he was writing. I have seen the——

Q. What was the occasion of having these papers?

A. Because the broker who was selling me this property, and all around there, if you please, were not willing to acknowledge anything that Woolf and Labatt did.

Q. Who was to have the paper you had copied off in pencil?

A. Mr. Bixler was to have it in exchange for this.

103 Q. Then the other paper was intended for you?

A. Of course.

Q. I ask you if that is the draft of the other paper, and in whose handwriting it is. (Showing Exhibit No. 14.)

A. There was so much bickering over it that I——

Mr. HOLLADAY. The question is, in whose handwriting is that?

The WITNESS. Well, I learned it to be the handwriting of Andrew Hill.

Q. Who is Andrew Hill?

A. He was an assistant of Mr. Bixler, then a boy in the office.

Mr. S. A. SHARP. A. E. Hill, now in the Bank of California?

A. Yes, sir; he was an assistant in the office, and is now an assistant in the Bank of California.

Mr. S. A. SHARP. I will ask you if that is the draft of the paper that was to be executed to you. (Referring to Exhibit 14.)

A. It is one of those.

Mr. HOLLADAY. I object to that.

Mr. S. A. SHARP. About the draft you saw, is that paper——You said you saw a draft of the paper; is that the paper you saw?

A. Yes, sir; I believe it to be the same and substance of it. I sat alongside Bixler while he made the pencil copy out; something for Mr. Hill to write; Labatt had gone out of the office, and I remarked——

104 The COURT. Do you know it to be the draft?

A. To my best knowledge it is.

Q. The question is, do you know? do you know as a fact, or do you presume so from circumstances?

A. I know it to be a fact that was the one.

Q. Do you know that is the one?

A. No; I am not positive that it is the one; it has the dates; it agrees with this in dates; it was written by Andrew Hill; that I did not know until yesterday, whose writing it was. I have telegraphed up to Virginia City for Mr. Bixler to come down here and I got an answer.

Mr. HOLLADAY. Is he coming?

A. Here is his dispatch, here somewhere.

Mr. PATTERSON. The purport of the dispatch is that he is sick and unable to come.

Mr. S. A. SHARP. Mr. Bixler is out of the State?

A. He is not in the State; he is in Virginia City. I think Mr. O'Neil has the dispatch in his pocket. I gave it to him to give to you. I tele-

graphed to Mr. Bixler to come down here about this transaction. I gave you the dispatch here, Mr. Sharp.

Q. I will ask you, Mr. Donahue, if anybody paid you; if you received any consideration for the paper you signed?

A. No, sir; not a cent.

Q. At the time you signed that paper did you know that Israel
105 E. Woolf had conveyed any interest that he claimed in any portion of the land in controversy?

A. I did not know any such man at all. It was Mr. Labatt.

The COURT. I do not think it is material. On what point of view is it material? I do not see how it is material. I will sustain the objection and strike out the answer.

Mr. S. A. SHARP. I reserve an exception. (Exception No. 17.)

Q. When did you first see that paper after you signed it?

A. Some years afterwards. Somebody asked me one day——

Q. In whose possession was it when you first saw it?

A. I saw it some years afterwards. I do not know who he was; but there was a man came and asked me one day on the street.

Mr. HOLLADAY. You answered the question; some years afterwards; that is all.

The WITNESS. I will say three or four years afterwards.

The COURT. The question is, in whose posssession was it when you first saw it?

A. I forget the man; but some one asked me on Montgomery street or Merchant street if that was my signature. He came up to me when I was in the street and brought me this paper, and asked me if that was my signature.

Mr. HOLLADAY. Was that Friedman?

106 A. No, sir.

Q. Was it Wores?

A. No, sir; I know Wores. It was not Wores.

Q. Was it Loomis?

A. No; I know it was not Loomis. I know the man; I see him every day.

Mr. SHARP. How long was it before you saw it the next time?

A. A couple of years before I saw it again. When I saw it again I bought it back; I purchased it back.

Q. Who had it then?

A. I think this man Loomis.

Q. Then you had seen it about two years before you purchased it back?

A. I told you this man; I forget his name; he was a notary. He is now in the coal business.

Q. Was it Cornwall?

A. Yes, sir; it was Cornwall. He brought me this paper one day in the street; I think that was the man. He asked me if that was my signature.

Mr. HOLLADAY. That was the first time you saw it?

A. That was the first time I saw it. I had forgotten all about that I had ever signed such a paper, and I asked him to let me look at it. I said, "Yes, that is my signature;" but that was the document which I wanted to know where he got it from. He said, "Never mind;
107 is that your signature?" And I looked at it and told him yes, I believed that was my signature, but I wanted to know where he got the document. He told me, "Never mind," and did not give me any satisfaction. I said I would like to know where he got it from.

Q. Did he tell you anything more about the paper?

A. No, sir; he went away. I said that was my writing; but that document, I want to know where you got it from, and all about it; and I never saw it more till I purchased it back under the advice of my attorney. He told me that it was injurious to me; and I was having trouble then with Sproul, claiming that outside piece of land, and I had a good many suits. That was Cornwall; I won't be positive of it; that is my memory. I see him every day, and always remember this when I see him.

Q. He was a notary public and is now in the coal business?

A. I think that is the man.

Q. He was a notary public at the time he asked if that was your signature?

A. I do not know whether he was or not.

Q. He was a notary public?

A. Yes, sir; he wanted me to go with him to a notary public, and I told him no; I told him it was my signature; I would not deny it.

Cross-examination:

108 By Mr. HOLLADAY. The house that Evans was living in is the same house called the Fleishacker house, is it not?

A. Yes, sir.

Q. Where Sam Fleishhacker used to live?

A. I don't know his first name; the man is dead who used to live in it.

Q. There is no dispute about that. John Evans afterwards lived in it?

A. He did.

Q. Evans was a tenant of Gautier prior to the time you bought, was he not?

A. Yes, sir.

Q. He continued right on, under you, did he not?

A. Yes, sir.

Q. Till the time of his death?

A. Yes, sir.

Q. His wife continued there a long time afterwards?

A. She continued there several years afterwards. I used to go out and see her myself, to bring her little things, and she would be coming to our house.

Q. McStay is in there since in the same place?

A. Yes, sir; he has gone out; there are other tenants in there; he is now down at Gilroy.

Q. He is not in there now?

A. No, sir. I have had several tenants in there.

109 Q. That we may get it down clearly, I will call your attention to this glazed map, in this the southeasterly corner. Is that the place you commenced fencing? State at which corner of the tract you commenced to fence.

A. I commenced fencing across the line that divides this tract from the Seligman tract.

Q. You made the east fence first, between the Belvidere ranch and the Seligman tract?

A. There was a kind of an old fence running up over the hill; just enough to mark—two red-wood stumps there.

Q. There was an old fence?

A. Yes, sir.

Q. What line did you fence next?

A. The south line next, I think, as far west as the 130-acre tract, because they stopped my men from working before they got there, Thomas Sproul and the others; there were four of them—horsemen with revolvers. I went out and talked with them and asked them why they stopped me; that that was my land, and if it was theirs I wanted to try to negotiate with them.

Q. It was a pretty rough set of fellows?

A. I did not wish any encounter with them, anyhow.

Q. The next line was the north line, and the next line the west line?

A. They stopped us there, and there is a jog in the fence somewhere. We ran down here to the jog in the fence, (showing.) We ran down there and they stopped me, then I came back and fenced it here, (showing.)

110 Q. That made the enclosure of the 130-acre tract complete?

A. Yes, sir.

Q. Except the Belvidere ranch?

A. Yes, sir. There was a portion further west that I did not fence. I did not know it at the time, but after I got to know it Buckley claimed it, and others—Sullivan and Cashman and others.

Q. That is further north?

A. It is further along the fence. My title-line runs outside of that, (showing.)

Q. That is not in this suit?

A. There is a portion of my land that I have not got inside.

Q. I have not asked you about that.

A. I did not care about suing for it. The land was not worth much at that time.

Q. In as much as I did not ask you about that, I will move that that be stricken out. At the time of this purchase from Gautier you say you had an abstract of the title made. Was that abstract present there in the office of Bixler & Casserly?

A. Bixler had a search made.

Q. Do you remember who made that search?

A. No; I do not.

Q. Which one of the searchers in town, here?

A. No, sir; I do not know. Mr. Bixler attended to it all.

111 Q. Do you remember in what form that abstract was; whether in book form, this way, (showing,) or in a roll, in this shape? (showing.)

A. In a roll.

Q. I will mention the names of the searchers here, chiefly, and see if you can remember which searcher it was.

A. I could not tell you if you should mention the man, for I don't know. I did not attend to it at all.

Q. How long did that negotiation last, between you and Gautier, before you took this deed?

A. I suppose it lasted two or three weeks.

Q. You say you went——

A. I went out there and looked all over it.

Q. Evans was there, then?

A. I went with the broker, Mr. Dupre.

Q. You and Mr. Dupre went out. Did you see Andrew Thompson there when you went to look over it, before you purchased?

A. No; I don't think I did.

Q. Did you see those fellows there?

A. No, sir. They came in contact with me when I was there fencing.
Q. Gautier's tenant was there—Evans?
A. Yes, sir.
Q. Had he any cattle, stock, horses, pigs—anything—there?
112 A. There was. Yes, sir. I thought they belonged to Evans. I did not know who they belonged to.

Q. He seemed to be in quiet possession there when you went out to look?
A. Yes, sir.
Q. You did that before you purchased?
A. I went out with Dr. Gautier.
Q. You went out with Dr. Gautier?
A. Yes, sir; I think I did.
Q. Did you go around the ranch to see what condition the fence was in?
A. I went around; yes, sir; but they were hardly worth calling fences.
Q. Did you take any look at them with Gautier?
A. I went up on the hill.
Q. Did you go around?
A. No; I don't think I walked all around it: it was a very large tract of land. A portion of it was rough, sandy desert; kind of rough.
Q. You say you went to see Labatt during the pendency of this negotiation to purchase between you and Gautier. Where was Labatt's office at that time?
A. It was right above the banking-house of James King of William.
Q. Was Cardozo a partner of his then?
A. I don't know.
Q. Did you ever know Cardozo?
A. I might have known him, but not by name, before I went to see him.
113 Q. You found Labatt?
A. Yes, sir; I found Labatt when I went to see him.
Q. Did he go to Casserly's office during your fencing there?
A. Yes, sir.
Q. How many times did you meet Labatt in all?
A. Well, back and forward there, a good many times. He was there a good many times. I think he came there before I went for him; anyway I heard that he knew something about it, or that he had been over there. I didn't know what it was. Labatt wanted to be recognized there, but we didn't want to recognize him.
Q. Labatt wanted you to recognize Woolf, didn't he?
A. He wanted me to recognize him at first. I think Bixler and he had a good deal of talk about it. The broker said that Labatt had nothing to do with it, or Woolf either.
Q. The broker insisted that the title was clear?
A. Yes, sir.
Q. And that Woolf had no interest in it?
A. Yes, sir.
Q. What was the name of the broker?
A. A. Dupre.
Q. Where is he now?
A. He is dead; he died in this city.
Q. Whom was he employed by?
A. Gautier, I believe.

114 Q. He was anxious to make the sale?
A. Yes, sir.
Q. To make his commission?
A. Yes, sir.
Q. And insisted that the title was all right, and that Gautier had a right to sell?
A. Yes, sir; and told Labatt so. He was the broker for Gautier.
Q. He said that Labatt nor Woolf had no interest in it?
A. Yes, sir.
Q. Labatt didn't agree with him?
A. No; and he talked, and Bixler and Labatt talked. I know he wormed himself in, some way or another. He had nothing to do with it. He stopped the negotiation.
Q. Did you advise with Mr. Casserly on that subject? Did you confer with him personally, or was your interview with Mr. Bixler entirely?
A. I first went to Mr. Casserly. He was busy, and he turned me over to Mr. Bixler.
Q. Did Bixler do the business?
A. Yes, sir.
Q. Entirely?
A. Pretty much; with the assistance of young Hill; those two.
Q. Mr. Hill was a clerk in Mr. Casserly's office at that time, copying, and so forth?
A. Yes, sir.
(Here the witness was temporarily withdrawn.)

A. E. HILL, called for the defendant, sworn, examined.

115 By Mr. S. A. SHARP. Do you know the handwriting of that paper?
(A paper, marked Exhibit 14, handed to the witness.)
A. Yes, sir.
Q. In whose handwriting is it?
A. It is my handwriting.
Q. Look at the paper; I will ask you if you were clerk in Mr. Casserly's office?
A. I was clerk in Mr. Casserly's office from December, 1860, until March, 1864—until May, 1864.
Q. Under what circumstances did you prepare that; did you write that paper, and under whose direction?
A. I wrote this under the direction of Mr. Bixler.
Q. About what time, Mr. Hill?
A. In May, 1861; it is dated in May, 1861.
Q. In whose handwriting is that?
(Handing the witness Exhibit No. 15, a copy of which is marked plaintiff's Exhibit No. 4.)
A. That is Bixler's.
Q. Were those papers made about the same time, or at the same time?
A. Yes, sir.
Mr. HOLLADAY. Probably he didn't remember anything about that.
A. They are both dated May, 1861.
Mr. SHARP. After reading these two papers, do you call to mind any circumstances connected with the drafting of the papers, and the execution of one and the signing of the other one?

116 A. I can't remember the execution of that, sir; I recollect the circumstance of——

Q. Just state briefly your best recollection about the two papers.

A. I have no recollection of those two papers at all.

Q. Outside of the handwriting?

A. Outside of the handwriting. One is my own and one is Mr. Bixler's.

Q. By reading the papers, have you any recollection of the circumstances under which they were drawn? I mean do the papers afford or refresh your memory at all?

A. I know that Mr. Donahue bought the ranch in 1861, and there was a long controversy before the title was passed; and just previous to the passing of the title, Labatt, a lawyer, came in some way or other; but how he came in or under what circumstances I don't recollect. I recollect the office, passing the title, examining the title.

Q. That is all you recollect about it?

A. Yes, sir.

No cross-examination.

PETER DONAHUE recalled for further cross-examination.

By Mr. HOLLADAY. Do you remember the time when you commenced fencing there, after you took this deed from Gautier?

A. I do not; no, sir.

117 Q. Can you approximate between the intervals of your receiving this deed from Gautier and your commencing to fence, as to months, or years, or days?

A. I might have been 60 days; I might have been 30. It was very close afterwards, because I went out and looked at it.

Q. It was in the interval that this difficulty arose with these fellows that interfered with your fence, was it?

A. Yes, sir.

Q. You never heard of their claim before, did you, before they interfered with your fencing?

A. No; I never heard of their claim before. I never heard of anybody's claim except Dr. Gautier and Hastings.

Q. And Woolf—you heard of that, didn't you?

A. No; I heard of that from Labatt; it was not recognized.

Q. These other fellows didn't appear on record at all?

A. Not that I am aware of.

Q. You say you bought them off—bought your peace to get them out of the way?

A. I considered I was buying peace.

Q. That was a set of roughs, and you considered that they had no rights there, and it was cheaper to give them something to get rid of them?

A. They pretended to have a right and be in possession. They didn't dispute me till a certain point where I was fencing.

118 A. It was only the west half they disputed?

A. Oh, they disputed me on both sides. I had them brought up before Judge Sheppard. I didn't arrest them all. I left one out. I believe he helped me up the hill, because I had a crutch, and I left him out, so I could not make it out a riot, and they were all discharged. The only way that they could be arrested was under the riot act, at that time, so Judge Sheppard said.

Q. Refer to some of those streets and diagrams, and state how far, east and west, the fellows appeared to resist your fencing.

A. I could not tell, by that map, exactly. I was in a buggy, and my men were fencing. I could not walk at that time. They stopped me on this point, I know. I wanted to fence what is known as the Sproul tract.

Mr. HOLLADAY. The witness points out a place on the diagram at a point about Sixth street, and a place on the hill behind Evans' house.

Q. Did they claim any land here? (Showing.)

A. They claimed here. There was a brush-fence here. Somebody had thrown down a fence that was made of brush. It had been thrown down and they claimed across here. (Showing.)

Q. Did they claim anything inside of the blue lines?

A. I don't *sabe* the blue lines.

Q. Inside the Fleishacker tract, did they claim anything in the enclosure?

119 A. There was only about, as I said before, some twelve or fifteen acres fenced in there. I don't think they claimed any of that.

Q. How far did they assert any claim to that?

A. This side of the road. They claimed pretty close to it. I could not tell where, exactly. They were on horseback, and they built a house away over there. It wasn't a house. They put up lumber in the shape of a box, with a roof on it.

Q. Is that a house called the "Donahue house?"

A. No, sir. I have since built a house on that place.

Mr. HOLLADAY. The witness says the fellows who resisted him had a little kind of a house unfinished.

The WITNESS. They had none when they first resisted me. They put one up at this point. (Showing.)

Mr. S. A. SHARP. You said there was twelve or fifteen acres around the house?

A. Yes, sir.

Q. Does that dotted line on Exhibit 10 show it?

A. Yes, sir.

Mr. HOLLADAY. The witness says that the lines on the large map refer to the Fleischacker enclosure.

S. A. SHARP. That is about the shape of it?

A. I don't remember that exactly.

Mr. HOLLADAY. These chaps, Moulton, and Andrew Thomp-

120 son, and Sproul, who resisted you, had they any improvements inside of this tract at all?

A. I could not see any.

Q. You recognized it as a mere violent pretence against your rights, did you not?

A. Yes, sir.

Q. And whatever you took by their deed, you thought was merely the cheapest way to get rid of them; is that so?

A. Well, they had that house there; Gautier didn't recognize them, so he told me, but they claimed.

Q. You say your improvements out there cost you as much as twenty-four or twenty-six thousand dollars. I understand you to say what you invested amounts to some twenty-four or twenty-six thousand dollars?

A. Twenty-five or thirty thousand I said, including the road and expenses, and one thing and another, and I expended a few years ago.

Q. That includes all the expenses you have been put to?

A. Yes, sir.

Q. Does that include the purchase-price of the land?

A. I didn't include the purchase-price of the land when I spoke.

Q. When you spoke of twenty-five or thirty thousand dollars?

A. No, sir; I don't think it included the purchase-price of the
121 land. It included the money I expended for labor. I have no book-accounts; I am only guessing.

Q. That is only an estimate of yours?

A. Yes, sir.

Q. Do you remember, as a separate item, how much you contributed to the expense of that road, in one way or another?

A. I don't remember.

Q. Wasn't that the largest portion of your expenditures there?

A. Well, it was one of the largest portions; yes, sir.

Q. A witness on trial speaks of the fence he built for you, and it cost nearly a thousand dollars, he said.

A. I don't know who that witness is.

Q. Patrick H. Owen; it was on the former trial.

A. He built a large fence for me, but he only put up this line of fence on the road. He built no fence for me at all, except that he superintended this road-fence; that is all.

Q. Well, that is not material.

A. Well, it is an answer to your question. I say he built a fence around here. He only superintended the building of the fence along that toll-road; that is what he has been attending to.

Mr. PATTERSON. Fencing costs six hundred dollars a mile in this State, does it not?

A. It costs eight hundred dollars a mile; common, plain railroad-fence costs eight hundred dollars a mile.

122 Mr. HOLLADAY. That is in the country, where lumber is not so cheap; but don't it cost more out in the country than it does in the city?

A. I don't know that it does.

Q. You have to pay for transportation?

A. The estimate of all railroad-fences from San Francisco to Gilroy, where the roads will transport their own lumber, it averages eight hundred dollars a mile.

Mr. SHARP. You have to transport the lumber, too?

A. Yes, sir; and we don't charge anything for it.

Mr. HOLLADAY. How many boards do you refer to?

A. Four boards.

Q. And a cap?

A. There ought to be a cap to make a good fence, but they don't put a cap on, because it is too convenient to jump over. They just put in posts and boards. They don't put a cap on the fences; it is a little too convenient to jump over. It strengthens the fence. But good farmers do.

Q. You remember how much you paid those chaps—Andrew Thompson, Moulton, and the others—to get them out of that?

A. I don't know.

Q. How much did you pay Gautier for that land?

123 A. I don't remember; I think I paid him about forty-seven hundred dollars. I didn't pay Gautier at all; I paid the broker. I forget—forty-five hundred dollars, or something.

Q. You paid it to the broker?

A. Yes, sir.

Mr. SHARP. The deed says forty-five hundred dollars.

A. I paid that; Duprez and Gautier had a difficulty about the money,

because it appears that Duprez charged a big percentage, and Gautier complained that he wasn't getting his share of the money.

Mr. HOLLADAY. You think that is the price you paid, $4,500?

A. That is my recollection about that. Yes, sir. He commenced by asking double the amount of money.

(It is admitted that this paper signed by Donahue—a paper acknowledgment, with his name erased—is in the handwriting of David Bixler, who witnessed it.)

The WITNESS. That was not erased until after I purchased it from Loomis.

Mr. HOLLADAY. How much did you pay Loomis for the paper you say you purchased?

A. Well, I suppose he realized. I did not pay him money, but I gave him eight acres of choice ground. He must have realized some seven or eight thousand dollars for that paper. I gave it back.

Mr. SHARP. You mean Loomis and Wores together?

124 Mr. HOLLADAY. To Loomis and Wores you conveyed eight acres—four acres apiece?

A. Yes; each then——

Q. Thereupon they gave up this paper to you?

A. Yes, sir; each then got their pay in scrip, and one thing and another, and I have been unable to get anything on account of this suit.

Mr. HOLLADAY. I ask that that be stricken out.

The COURT. Strike it out.

The WITNESS. I simply mention it as it is connected with the case.

Mr. HOLLADAY. Do you remember who first negotiated with you for that eight acres, for Wores and Loomis?

A. I was talking with Wores myself in person.

Q. Coming at it direct, did Friedman come to you for them, Wores and Loomis?

Mr. PATTERSON. I object to that as not cross-examination.

A. I never knew him to come for them; Mr. Friedman came for himself.

Mr. HOLLADAY. He came for himself?

A. Yes, sir; about five acres.

Q. Did he have this paper with him?

A. No, sir; I never seen him.

Q. Did he tell you where it was?

A. No, sir.

Mr. PATTERSON. I object to that as not cross-examination.

A. Mr. Sharp told me where it was.

125 Mr. HOLLADAY. Do you know whether it was under the Woolf interest or under the Davis interest that Wores and Loomis claimed?

A. I could not justly say, after the land had got to be valuable, and the act of the legislature passed, there was so many claimants came from all sides.

Q. Do you remember which interest they claimed?

A. I don't remember just now.

Q. You say you don't remember?

A. I had a large business in this city, and gave this no attention. I was very busy at work here.

Q. Did they show you their deeds?

A. I could not say whether they did or not. They may have been to Mr. Sharp. I have acted under the advice of Mr. Sharp in the matter;

they may have done it; I don't remember. I was working at the Camanche, and once in a while Mr. Sharp would send for me.

Q. Did you ever meet Friedman at Sharp's office?

A. Yes, sir.

Q. Did you ever meet Friedman at Sharp's office in reference to his claim on the land—with reference to his claim in that land?

A. He never pretended to have a claim until more recently, and then it was something under Mr. Rice. When I was trying the outside tract with Sproul before Judge Pratt—we had quite a suit there—Friedman came to me in Mr. Sharp's office.

126 Q. What was he after?

Mr. PATTERSON. We object to that. We have not examined the witness about that.

Mr. HOLLADAY. You met Mr. Friedman at Sharp's office?

Mr. SHARP. We are willing to let it come out, if they make him their own witness.

The COURT. Is that in regard to this paper?

Mr. SHARP. No, sir; in regard to some interview between Mr. Donahue and Friedman, which Donahue speaks of, about the time some suit was coming on before Judge Pratt. We have no objection to the evidence, only it ought not to be considered our evidence. This has nothing to do with the paper; this is about five acres in another piece of land.

Mr. HOLLADAY. I am not speaking of the five acres; I am speaking about meeting him in Mr. Sharp's office, when Mr. Sharp was present. You met Mr. Friedman on the street, you said?

A. I had several interviews with Mr. Friedman.

Q. Was one at Mr. Sharp's?

A. Two or three times at Mr. Sharp's office.

Q. Was that paper present on any occasion?

A. I don't remember seeing it there at all.

Q. He never told you he had such a paper? That is your present recollection?

A. Yes, sir; it may have been present, but I don't recollect to have seen it.

Mr. HOLLADAY. You don't pretend to say it was not?

127 A. No, sir; I don't pretend to say it was not.

Q. I will read Mr. Sharp's evidence on the former trial by and by. How many interviews did you have with Mr. Friedman, in all, about this land?

A. I had several interviews with Mr. Friedman. It was while I was trying the suit with Sproul; and also I had another suit with Fleishacker, the brother of the deceased.

Q. Aaron Fleishacker?

A. Yes, sir; who claimed something or other under one of these children, from his brother, notwithstanding I had his brother's deed. Mr. Friedman came to me and said he could be of great service to me.

Q. I don't ask you that; I ask you how many interviews you had with Mr. Friedman, in all?

A. I don't remember; I had several.

Q. Once in the street, on Market street?

A. Yes; two or three times on the street; and I met him, you know, while these two were going on. He asked me how I was getting along.

Q. How many times at Mr. Sharp's office?

A. Well, I remember one distinctly, and I think two or three times.

Q. This paper you executed in Mr. Bixler's office—Bixler & Casserly's, you say?

A. Yes, sir; Mr. Casserly knew nothing about it.

Q. Mr. Casserly knew nothing about it?

128 A. I don't know that he did; he might have known about it, and left it with Mr. Bixler.

Q. You signed it, Mr. Bixler witnessed it, and you left it with Mr. Bixler?

A. That is my impression.

Q. He was your attorney?

A. He was my attorney.

Redirect examination:

By Mr. SHARP. Do you know where Mr. Labatt is, whether in this city or not?

A. No, sir; he is in Virginia somewhere. I sent him a telegram yesterday, and got an answer yesterday.

Q. It is of Mr. Bixler. I am speaking of Mr. Labatt.

A. Oh! I know nothing about Mr. Labatt. He is East somewhere. Mr. Labatt has not been in this State for some years—twelve or thirteen years; no, not as much as that; he has been gone ever since shortly after that transaction, and I have not seen him.

Mr. SHARP. I now offer the paper, marked "Defendants' Exhibit No. 14," indorsed "Disclaimer of Henry J. Labatt and others, Peter Donahue, May , 1861," (read in evidence) of which the following is a copy:

We, Henry J. Labatt, of the city and county of San Francisco, State of California, and Israel E. Woolf, of the city of St. Louis, State of Missouri, hereby disclaim, for ourselves, our heirs and assigns, respectively, any right, interest, or claim whatsoever, jointly, severally, or

129 otherwise, unto Peter Donahue, of said city and county of San Francisco, his heirs or assigns, in or to any part or portion of that certain tract of land, situate in said city and county of San Francisco, bounded and described as follows:

Beginning at a point which is the southeast corner of a parcel of land, now or heretofore known as Crochet's land, which point is located in the southwest quarter of section seven, township two south, range five west, according to the public surveys of the United States, and running thence along the westerly boundary-line of land now or lately claimed by Cohen & Mayer, south 32¼ deg. east 33 chains; thence west 97 chains 50 links; thence north 40 chains; thence east 40 chains; thence south 12 chains; thence east 40 chains to the point of beginning; containing two hundred and ninety-six acres, excepting the interest of the said Woolf, as the same existed on the 10th day of December, A. D. 1857, of an undivided half part of a tract of 80 acres lying and being within the following boundaries, so far and to such extent as the same is embraced in the parcel of land first heretofore described; such tract being limited to eighty acres, if it should happen that a greater quantity should be contained in the said following boundaries, to wit:

Commencing on the southeast corner of an eighty-acre lot of land, heretofore belonging to Luzard Atsupard; thence running north 52 deg. 30 min. west 16 chains 4 links; thence south 48 deg. 35

130 min. west 4 chains 9 links; thence north 43 deg. west 74 chains 65 links; thence south 40 deg. 40 min. west 8 chains 50 links; thence south 43 deg. east 74 chains 65 links; thence south 41 deg. 15 min. east 10 chains 27 links; thence north 60 deg. east 6 chains 93 links; thence north 56 deg. 50 min. east 2 chains 48 links; thence north 65 deg. 30 min. east 6 chains 24 links to the beginning.

And we and each of us do hereby release to the said Peter Donahue, his heirs and assigns, all right, claim, or interest, if any we or either of us have, of, in, and to the said parcel of land hereinabove first described, or any part thereof, with the exception aforesaid.

In witness whereof, we have hereunto set our hands and seals this day of May, A. D. 1861.

Defendant next offered and read in evidence paper marked "Exhibit No. 4 or 14," which is as follows:

I, Peter Donahue, of the city and county of San Francisco, State of California, hereby acknowledge for myself, my heirs and assigns, that on the 10th day of December, A. D. 1857, Israel E. Woolf, now of St. Louis, in the State of Missouri, was entitled to an interest of an undivided half part of a certain parcel of land, situate in the city and county of San Francisco, containing eighty (80) acres, being in the easternmost part of the tract of land known as the Belvidere rancho, according to the survey of V. Wackenruder, in October, 1858; and that if the
131 said Woolf has not conveyed such interest, or any part thereof, is still entitled to the same.

This instrument being an acknowledgment only and not a covenant of any kind whatever.

Witness my hand this 23d day of May, 1867.

Witness:

DAVID BIXLER.

C. V. GREY, called for defendants, sworn, examined by Mr. Patterson.

Q. You are of the firm of Grey & Brandon?

A. Yes, sir.

Q. Attorneys and counsellors at law in this city?

A. Yes, sir.

Q. You know Mr. Friedman, the plaintiff in this action?

A. I do.

Q. Did you ever see a power of attorney from Israel E. Woolf to Grey & Brandon?

A. I think I have; show it to me and I can tell, sir; I feel quite sure I have seen it, though I don't know at the present moment.

Q. Did you know Israel E. Woolf before you received that power of attorney?

The COURT. What do you propose to show by Mr. Grey?

Mr. SHARP. That at the instance of Mr. Friedman, he, the witness, wrote to Woolf and got a power of attorney to make a conveyance to Friedman; that nothing was paid to Woolf; that Grey was to have
132 an interest, and Brandon and Friedman; and that he ignored the idea that Donahue fenced the land, or made it under any agreement or confession that Donahue was to hold for Woolf or any one else

The COURT, (after discussion.) I sustain the objection.

Mr. SHARP. In order to save the exception, I will ask Mr. Grey if we offered to prove more by him than we can?

Mr. PATTERSON. Well, let us take it by piecemeal.

Q. In whose handwriting in this power of attorney? (Showing paper to witness.)

A. The power, independent of the signature?

The COURT. You have stated that it is a power of attorney from Woolf to Grey & Brandon?

A. Yes; I have seen that power of attorney before.

Mr. PATTERSON. From Woolf to Brandon?

The COURT. That is already in evidence, is it not?

Mr. PATTERSON. Yes, sir.

The COURT. Well, whose handwriting is it?

A. All of the filling in, except the date and the signatures of the witnesses, is in the handwriting of Brandon.

Mr. PATTERSON. Your partner?

A. Yes, sir.

Q. At whose request was it prepared?

A. I cannot say; what is the date of it?

Q. It is dated the 15th November, 1867.

133 A. I guess it was written here; I should say so; Mr. Brandon was here in 1867.

Q. Where was Mr. Woolf?

A. I don't know.

Q. Did you know Mr. Woolf before?

A. I cannot say whether or not.

Q. Where was it signed after it was prepared?

A. I have no doubt where it was signed, but I have no recollection of it.

Q. How was it received back into your office?

A. Well, that I don't know, and can only state my belief; I am pretty certain I am correct, but it is only my belief.

Mr. PATTERSON. Do you know to whom it was delivered, after it was received into your office executed?

A. I am certain in my own mind to whom it was delivered, but I don't recollect.

Q. You don't recollect the time?

A. I don't recollect either the time or fact, but I am certain what was done with it, though I have no recollection.

Q. What are you certain of?

A. Well, I am certain it went from our possession to Mr. Friedman's.

Q. It purports on the back to have been recorded at the request of Mr. Friedman, January 20th, 1868. Did Mr. Friedman apply to your office for it, do you know?

Mr. HOLLADAY. We are coming now to the point where it has been ruled out.

134 The COURT. No; it is all preliminary proof so far; go on.

A. Mr. Friedman was in our office a number of times in connection with the matter which the power relates to, but I may state, in relation to this matter, that whatever of the principal part of the business and negotiation in relation to this matter that was done was done by my partner. (No cross-examination.)

J. R. BRANDON was then called, as a witness on behalf of defendants, and, having been duly sworn, testified as follows:

The written portion of the power of attorney from Woolf to Grey and myself is in my handwriting; my impression is that I received a letter from Mr. Woolf some time prior to this power, but cannot state whether this power was drawn at the instance of Friedman or Woolf; I believe I have a letter now in my safe; I knew Woolf personally when he was here in 1855 and 1856; I had done business prior to that time for him; I made a deed, under that power of attorney, to Joseph S. Friedman; it is utterly impossible to explain the matter of the consideration without referring in some way to Woolf's letter. The whole matter is explained

by the written instrument I have in my possession, and which reads as follows:

This agreement, made this twentieth day of January, 1868, by and between Israel E. Woolf, of London, England, Joseph R. Brandon and Cyril V. Grey, of San Francisco, California, parties of the first part, and Joseph S. Friedman, of San Francisco, party of the second part, witnesseth: That for and in consideration of the conveyance this day made by said first parties to said second party, by quitclaim-deed, of all their interest in and to a tract of land in said city of San Francisco, described as follows: Commencing at a stake set for the southeasterly corner of this survey, and for the southwesterly corner of a survey made for S. T. Meyer, thence north 34 deg. west 40 chains to a stake set for the northeasterly corner, with two evergreen trees 5 in. in diameter, marked [X]; thence south 56 deg. east 20 chains to a stake set for the northwesterly corner; thence south 34 deg.—40 chains to a stake set for the southwesterly corner; thence north 56 deg. east 20 chains to the place of beginning, being the same property as recorded in the county recorder's office of the city and county of San Francisco, in Liber B, Miscell. Records, p. 292, and surveyed by Robt. B. Hays, surveyor, June 21, 1852; also recorded in said recorder's office in Liber 1 of Covenants, page 350, on July 23d, 1852; also described as follows, to wit: Beginning at the southeast corner of the eighty-acre tract of land belonging formerly to Luzard Atsupard, thence running north 52 deg. 30 min. west 16 chains 4 links; thence south 48 deg. 35 min. west 4 chains 9 links; thence north 43 deg. west 74 chains
136 68 links; thence south 40 deg. 40 min. west 8 chains 59 links; thence south 43 deg. east 74 chains 60 links; thence south 41 deg. 15 min. east 10 chains 27 links; thence north 60 deg. east 6 chains 93 links; thence north 56 deg. 50 min. east 2 chains 48 links; thence north 65 deg. 30 min. east 6 chains 24 links, to the place of beginning; containing eighty acres, more or less.

The party of the second part covenants, promises, and agrees with the parties of the first part that he will, within three months from the date hereof, commence and institute such legal proceedings as shall or may be necessary to establish the title of the party of the second part in and to, and to obtain the possession of, the said described tract of land as against the present holders, claimants, and possessors thereof, and will further prosecute the said proceedings diligently, faithfully, and in good faith, to the best of his power and ability, unto a successful termination, so as to secure to the said party of the second part the title and possession of the said land; and upon the successful termination of said suit or proceedings instituted, or upon the said party acquiring thereby, or by any other means whatever, the title or possession to or of the said land, or any part thereof, that he will, at his own proper charge, make, execute, acknowledge, and deliver to the parties of the first part a grant, bargain, and sale deed of a tract of four acres, part and parcel of the said land, conveyed free from all charges and encumbrances whatever, the said tract of four acres to be of average location in
137 such part of the said 80 acres as may be recovered or acquired by the party of the second part; and in case the said parties hereto cannot agree as to location, the same to be settled by arbitration, one arbitrator being selected by each of the parties hereto, and the two selected to name a third, and the majority of those so nominated to decide. Should either party fail to select an arbitrator, the one selected by the other party shall proceed to locate the said tract, and his location shall be final.

It is, however, agreed and understood that, in case of the recovery or acquirement of said land before described, or any part thereof, and the city authorities of San Francisco should appropriate the same, or any part thereof, for a park or streets, that the tract of four acres agreed to be conveyed shall be reduced in extent to the same proportion as the portion recovered or acquired by the party of the second part shall be reduced by such appropriation; provided, however, that in such event of the said reduction in the four acres agreed to be conveyed, the party of the second part will pay to the parties o the first part, in lieu of such deficiency, such amount as the party of the second part may be entitled to receive from the city authorities, or otherwise on account of such deficiency appropriated.

It is further agreed by the party of the second part that in case he shall fail to fulfill truly and faithfully all the aforesaid covenants, prom-
138 ises, and agreements on his part, or if, having instituted the proceedings agreed to be taken, he shall directly or indirectly, or in any way, compromise the said claim made to the said eighty-acre tract without the consent in writing of the said C. V. Grey and J. R. Brandon, that he will pay to the parties of the first part, as liquidated damages and as the estimated and agreed value of their said interest in said tract, the sum of five thousand dollars, in gold coin of the United States.

It is agreed between the parties hereto that this agreement and the bond hereto annexed shall not be placed on record by the parties of the first part.

In witness whereof the said party of the second part has hereunto set his hand and seal this 20th day of January, 1868.

JOS. S. FRIEDMAN. [SEAL.]

[Three 5-cnt. int. rev. stamps, cancelled Jan. 20th, 1868. J. S. F.]

There is a bond attached, as follows:

Know all men by these presents that we, Joseph S. Friedman and Edward F. Ohm, of the city and county of San Francisco, State of California, are held and firmly bound unto Israel Woolf, of London, England, and J. R. Brandon and Cyril V. Grey, of San Francisco, in the sum of six thousand dollars, gold coin of the United States of America, to be paid to the said obligees, their executors, administrators, or as-
139 signs, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 20th day of January, in the year 1868.

The condition of the above obligation is such that if the above-bounden Joseph S. Friedman shall well and truly perform all and singular the covenants, promises, and agreements on his part agreed to be performed in the agreement hereto annexed between said Friedman and the said obligees, then this said obligation to be void; otherwise to remain in full force and effect.

JOS. S. FRIEDMAN. [SEAL.

Sealed and delivered in the presence of—
E. F. OHM. [SEAL.]

Being first duly stamped with int. rev. stamp of 25 cts., cancelled Jan'y 20, 1866. J. S. F.

(Indorsed:) Agreement. J. S. Friedman and Woolf, Gray and Brandon. Also, bond of Friedman and Ohm to same parties. January 20th, 1868.

No other consideration for the execution and delivery of that deed of January 20, 1868, passed from Friedman, except the execution and delivery of that paper. I think Woolf was to get two-thirds as his share in the transaction.

This paper does not mention that. My impression is that we were to get one-half or one-third for managing his business for Woolf. My
140 impression is that my attention was first called to Woolf's interest out there from a letter which he wrote to me. I think I have that letter, and will produce it. I don't think I knew Mr. Friedman before that time. It strikes me that Friedman broached this matter to me. I think the first intimation I had that Friedman had broached Woolf upon this subject was a letter of Woolf's. The description contained in that deed was furnished me by Friedman, I think.

Cross-examination by Mr. HOLLADAY:

Neither Grey nor myself claimed any interest in the land. We could only claim an interest in the result of the suit. Under that agreement Friedman is bound to convey either the four acres, if he gets the land, or to give us an equivalent in value in case it was taken for a park. Mr. Woolf made a deed of the piece of property to us, upon which we made this agreement. Woolf deeded either a half or a third interest to us, upon which we made that agreement.

Subsequently, this deed, No. 18, was made by Grey and myself to Friedman. That is my signature, as attorney for Woolf. That was the only interest which was conveyed by Woolf to us, whatever it was.

This interest we conveyed to Friedman; he did not purchase it from us, aside and separate from this agreement, and pay the consideration. I have heard that Friedman purchased Mr. Grey's interest.

141 (The same witness, being subsequently recalled, produced and read the letter received from Woolf, which is as follows:)

ATMOSPHERIC CHURN COMPANY, Limited,
119 NEW BOND STREET,
London, July 22, 1867.

JOS. BRANDON, Esq., *San Francisco:*

DEAR SIR: Hearing you are practicing law, I avail myself of same to enclose you some papers received from a Mr. J. S. Friedman, of your city, by which you will perceive he desires me to sign a deed for a piece of property which he says was sold by Louis Cohn, under my power of attorney, but for which I never received consideration. I believe you will find that Geo. H. Davis had a power of mine which revoked L. Cohn's, and was put on record before the deed of L. Cohn's. I leave you to find out what screw is loose, and wish you to make the most of it, taking one-third of whatever you get as a compensation for your services. I own one-half of the whole of this property. Please let me know, by return of mail, if you wish to take the matter in hand, or not, and give me what particulars you can gather. If you will send me some of your cards, can send you business. With kind regards to Mrs. Brandon, joined with my wife, etc., believe me

Yours, very truly,

I. E. WOOLF.

There was a deed inclosed in this letter, which I think is the one I now present. I am not certain of this. It is as follows:

142 Upon comparison, I should say that the written portion of that deed was in Friedman's handwriting.

(It was here admitted by plaintiff's counsel that said deed was in the handwriting of the plaintiff, Friedman.)

My impression is that the letter from Friedman to Woolf was enclosed to me in Woolf's letter. It reads as follows:

MR. I. E. WOOLF—My Dear Sir: You will perhaps recollect me when in the wholesale cigar and tobacco business, Sansome street. I hereby forward you a quit-claim deed, and make a proposition to give you on delivery here $100 in gold. You and Fleishacker, now deceased, and Davis, owned once the land you foreclosed, and through your attorney, Cohn, sold to Labatt and Cardoza, and they sold to Doct. Gautier; also, Davis sold to Gautier. I purchased since the interest all of Gautier and I. E. Holmes, heretofore owned by you and Davis. Now I have not possession of an inch; it's all squatted upon by a lot of Irishmen. I brought suit for it and wish to strengthen my title, and offer you the above hundred dollars to procure a quit-claim deed; all the Jews are out of it. Davis left the State, and cannot be found. I could perhaps get his and your deed, if I knew where he was, as I believe he holds your power. Will you write me where he is? Something has to be done, as by August the statute of limitation cuts all us
143 off. You run no risk, only I wish your deed in evidence against the squatters. Send the deed, properly acknowledged before a United States consul, to any of your friends, or Wells, Fargo & Co., on delivery to pay the money. You perhaps recollect my cousins, Isaac Hellman & Co., No. 6 Pine street, St. Louis, Mo., wholesale liquor merchants, to whom I wrote, and he informed me you had gone to London with Mr. Abrahams; in business, so he heard.

Hoping to hear from you, I remain,

Respectfully yours,

JOS. S. FRIEDMAN.

My impression is that Woolf left the State of California in 1855 or 1856. I do not think he has ever returned. There was also a letter received in the same package, written by Friedman to George H. Davis; it is as follows:

SAN FRANCISCO, *May 10th*, 1867.

GEO. H. DAVIS, Esq., *New York:*

DEAR SIR: Having purchased all the interest heretofore owned by Dr. Gautier and Holmes, and they purchased of Labatt and Cardoza, and they of Woolf and you, which is all on record, but Labatt and Cardoza left the country, and I have not the original deed. I wish to get a quit-claim deed of your interest and Woolf, and you holding a power of attorney of said Woolf, I hereby enclose a deed to the care of Mr. A. Greenbaum, and offer you $100 cash on delivery of said deed by
144 Wells, Fargo & Co., signed by you and Woolf, or you as the attorney of Woolf—having not possession of an inch, and to fight a lot of Irish squatters, and your title will give me strength to my title. I heard Woolf was in Europe, but if you wish to, sign it. It has to be here before the 1st of August, as the statute of limitation will take effect and cut every one off who have not suit. I paid now such amount, and risk another hundred dollars for the above deed. You perhaps recollect me from early time, when I was in wholesale cigar business, afterwards in butcher business in San Antonio, across the bay.

Hoping to hear from you, I remain,

Respectfully,

JOS. S. FRIEDMAN,
No. 609 Wash. Street.

The deed has to be signed by yourself, and also by Woolf, by his attorney in fact, G. H. D., acknowledged before a California commissioner.

Indorsed: Geo. H. Davis, esq., New York City, care of Mr. H. Greenebaum.

Mr. Sharp, on behalf of defendants, then offered and read in evidence a deed from John R. McConnell, of the city and county of San Francisco, to James Rice, dated April 29th, 1865, acknowledged May 3d, 1865, and recorded March 12th, 1867, purporting to convey the undivided one-half of the Fleishacker and Levy tract—the 160-acre tract; also a deed from James Rice to Peter Donahue, dated October
145 31st, 1866, acknowledged December 17th, 1866, and recorded March 12th, 1867; purports to convey an undivided interest equal to $26\frac{45}{100}$ of all that certain tract, including a part of the Donahue and Levy survey, inside Donahue's fences and inside the 80-acre survey.

PETER SCHAADT, then being called as a witness on behalf of defendants, and being duly sworn, testified as follows:

I came to California in November, 1852. I knew what was called the Fleishacker tract. I lived in the neighborhood of it on the south of the Fleischacker. I made the line myself; have lived there since 1857; commenced farming there in February or March, 1857. There was a pretty good house on the Fleishacker tract then, and a shed, a chicken-coop, or something, and a well. There were some 10 acres, more or less, inclosed around the house. The fence was poorly all around the tract. I cannot tell anything about the shape of the enclosure by the map. In going home I sometimes went through the mission, and sometimes by the old Sans Souci road. The latter road did not run on to the Fleischacker tract. We cut off to Seligman's tract. There was no road running near the fence on the Fleischacker tract. There were no roads at all; only trails or tracks all around. There was no open road.

In 1857 the fences out there were generally poor. I can't tell whether they were old or new in appearance. They were patched up with brush and wire and everything.

146 Donahue's man joined my fence in 1861 or 1862; have been living on my place almost continuously since 1857, and have always treated it as my home; I have passed over the ground a great deal; I was often at the house. I kept stock on my place, sometimes as high as 50 or 60 head; in herding them I had occasion to walk around the hills there, and all over the neighborhood. I don't live there exactly now; I live at the mission. I know what is called the Donahue fence; my fence joins what is called the Donahue tract, or Belvidere ranch. I put my fence there sometime in the spring of 1862 or 1863; there were no other fences immediately north of my fence when I built it, for a distance of 20 or 30 rods; there a fence commenced at the inclosure on Donahue's place; I do not know who built that fence.

Cross-examination:

By Mr. HOLLADAY. Built my house in the fall of 1857. I bought the land of John Sproul; there was then an enclosure on my land at the time I purchased, enclosing fifty or sixty acres. I bought a couple of hundred acres.

There were all sorts of fences, stone and rail, and ditches; the Fleischacker tract was poorly fenced; mine was poorly fenced too. I know the old Fleischacker house; John Evans was occupying it when I went

there; he said he was holding under some French doctor; he
147 had an enclosure of some eight or ten acres about the house; I did not measure it. Evans was digging stumps and burning charcoal outside the enclosure; the inside was clear; he commenced in two places; he worked south from the Fleischacker place, and west from the same place, improving from the house; he claimed to be a tenant of Dr. Gautier. I believe he was digging stumps and burning charcoal during all of the years of 1857, 1858, and 1859.

Never saw any other fence, except that enclosure around the house, on the Fleischacker tract. I can't say whether he had a ditch or not, on the other side. I don't know whether Evans claimed any more land than that which was within the enclosure; he claimed to be on Dr. Gautier's land, when he was digging stumps. I remember a fence outside and around the place where he was digging roots and burning charcoal; it was made of brush and rail and board, once in a while, just as he picked it up. Evans had some cattle, three or four head, and raised a few calves. I sold him some calves once, myself; he had two horses; they ran outside of the spot which was cleared; they ran outside of the fence. I claimed nearly 200 acres; the Fleischacker tract bounded mine on the north. I didn't know whose land Evans was on; didn't bother my head about it.

Mr. Sharp, on behalf of defendants, reads the testimony of Andrew Thompson and John Treat, taken at the last trial, as follows, viz:

148 ANDREW THOMPSON, called for the defendant, sworn, examined.

By SOL. A. SHARP. Do you know the premises called the "Belvidere ranch?"

A. Yes, sir.

Q. How long have you known them?

A. I have known them almost since they were taken up.

Q. How long?

A. Since 1853 to 1854.

Q. Between 1853 and 1857 were you out there on the premises; if so, how often?

A. Well, very often; I was out there probably once or twice a week sometimes; and sometimes I would not go there for a month; but I went over the ground very often.

Q. Did you ever occupy any portion of the ranch? If so, at what time?

Mr. HOLLADAY. I object to that question, whether he occupied or not.

The COURT. Let him state what he did.

By SOL. A. SHARP. What did you ever do out there?

A. Well, sir; I built a house on to it.

Q. What time?

A. In 1861.

Q. In connection with whom?

A. Mr. Treat and Mr. Moulton.

Mr. HOLLADAY. Who is Mr. Treat?

A. Mr. John Treat.

Mr. S. A. SHARP. What Moulton?

149 A. Mr. James B. Moulton.

Q. Anybody else?

A. Yes; John Sproul.

Q. What did you do there besides building the house you have spoken of?

A. Well, we put a fence up; put a fence around it.

Q. Look at that large diagram (referring the witness to defendant's Exhibit No. 10) and point out where you had a house.

A. This is the old house; (showing) that is the house that Evans lived in at the time; the Fleischacker family——

Q. Where was the house you had there?

A. Our house was very near west of that.

Q. West of the Gautier house as marked on this map?

Q. How far west?

A. I can't tell you how far west it was from this house; but I can tell about the distance it was.

Q. Just tell about where you think it was.

A. Well, sir, it was about in that position, (showing;) I don't know how this map runs; that is where I think it was——

Mr. HOLLADAY. Make a mark about where you say, in that position, so that we will know. [Witness marks with pencil on the map, thus (T.)]

Mr. SOL. A. SHARP. Now I ask you what fences were there in 1861, about the old house marked "Gautier house" on the map?

150 A. There is a line drawn there that probably might describe the fences. I cannot tell whether that describes them or not, but it was very near such a line as that would describe. The fence was made with a ditch and sticks stuck down into it and brush into it and iron into it, and almost everything that will make a fence.

Q. What do you mean by iron?

A. Pieces of sheet-iron stuck into the fence.

Q. How near that fence was the house which you and Treat and the others had?

A. Oh, I guess it was, well, a thousand feet; well, three hundred yards, say. I am merely giving an approximate distance, you know.

Q. About nine hundred yards?

A. No, no.

Q. You state that you had a fence there?

A. Yes.

Q. Where was that?

A. That fence? Where we put a fence across was about like that across the tract. (Draws a line on the map with a pencil.) It is some distance this side of the house. I am merely making that——

The COURT, (interrupting.) Which direction from your house was the Gautier house?

A. West.

Mr. SOL. A. SHARP. Do you know the present central macadamized toll-road, where that is with reference to the premises?

A. Yes, sir.

151 Q. I will ask you to look at the diagram and state whether it is correctly laid down there, according to your notion of the premises?

A. This is the line between Seligm n and that, and that is the ditch. The whole fencing, in the first place, was a ditch in, over the enclosure. I think that is about where it is.

Q. From 1853 to 1857? We are speaking now of before 1861. From 1853 to 1857, what improvements were on these premises?

A. Well, Mr. Evans, when he got on it—I don't know whether it was in 1853 when he got on or not—but, after he got on, he took a piece up that laid this way, (showing,) a piece of three or four acres. He asked me if I thought he could grow green on it, or a crop of oats to feed his

horses. I don't know whether that is meant for the line of the old ditch or not.

Q. What do you mean by the old ditch?

A. Well, the ditch that enclosed the land.

Q. What land?

A. The land of the Fleishhacker claim.

Q. Show how the ditch ran.

A. Well, the ditch—I should think that was a very good programme of the ditch. It ran close to the house from about here (showing) and up in here, (showing.) Fleishacker or Evans cleaned a place off, and he made a fence around so as to protect it.

Q. Outside of the ditch?

A. Outside of the ditch.

Q. About how many acres?

152 A. I should think three or four.

Q. About how many acres were inside of the ditch?

A. In my judgment, about eight or ten acres.

Q. Was the Fleishacker or Evans house inside of the ditch?

A. Yes, sir.

Q. I will ask you if there were any other improvements; if so, what? You say there was this ditch, and so forth, from 1853 to 1857.

A. Well; from 1853 to 1857; no, I don't think there was any more improvements except that on it.

Q. Do you know the premises as they existed after Mr. Donahue went there?

A. Yes, sir.

Q. Do you know how the fences ran, after he went there?

A. Yes, sir.

Q. Were there any fences between 1853 and 1857 that corresponded with what is now known as the Donahue fences?

A. No, sir.

Q. Who succeeded you, Sproul, Moulton, and Treat?

A. Mr. Donahue.

Q. Under whom did they occupy?

A. They occupied under me, Treat, and Moulton.

Q. Who was there, living in it?

153 A. Well, a portion of the time Mr. Sharp lived in the house, and a portion of the time I lived in the house myself.

Q. What Sharp was that?

A. He is on the police now; I cannot tell you what his first name was.

Q. It was not William Sharp, was it?

A. No, sir; it was not William Sharp.

Mr. HOLLADAY. Was it Solomon?

A. No, sir; it was not Solomon.

Mr. SOL. A. SHARP. What was the condition of this Belvidere ranch as to the parts surrounded by this ditch, and the fence-piece of three or four acres, when you and Treat, Sproul, and Moulton went there?

A. The rest of the property outside of where we was, was not improved; there was nothing on it; there was a trace of an old fence, and we followed that fence.

Q. What do you mean by following the fence?

A. Well, we followed the trace of that old fence; we supposed probably somebody had claimed, but there was nothing to show a claim at all on to it, but we followed the line of this old fence.

Q. Did your claim interfere with this old fence?

A. No, sir; it did not.

Q. On what side of your claim was that old fence?

A. The old fence was on the east side of the claim.

154 Q. What remnants of the fence was there at the time?

A. There was nothing, only you could see there was brush put or laid there for years, and was almost destroyed, but you could see the line. I did not know who claimed it, or cut it; nothing of the kind.

Q. Was there any other remnant besides brush?

A. No, sir; nothing else.

Q. How near did that run to the house you have spoken of as having had there with Moulton and others?

A. Well, it ran about two hundred yards from the house.

Q. Which side?

A. On the east of it.

Q. About one hundred yards east of your house?

A. Yes, sir; east of our place.

Mr. HOLLADAY. The old fence, the old line of brush fence was two hundred yards east of your house; is that what you mean?

A. That is exactly what I stated; that is exactly what I mean.

Q. What kind of a house did you and Treat and the rest of you have there?

A. We had a pretty good house. I think it was twenty-two feet front and I forget exactly the depth, but I think it was about twenty feet deep; it is the same house that is now standing there on the place.

155 Q. Was it completed when you sold out to Donahue?

A. Yes, sir.

Q. How long had you had it there before you sold it to Donahue?

A. Well, I think it was two or three months before we made the——

Q. (Interrupting.) What time in 1861 did you build it?

A. I can't remember the date.

Q. You stated something about building fences, putting up fences.

A. We were to put up a fence between Donahue's line and ours, and Sproul, who was interested in the land adjoining us. His fence made ours. We were all interested together.

Q. Communicating with one side of the fence, say we take the south side. What kind of a fence was that?

A. Well, the line of the fence on the south side was the property now owned by Sullivan, I think.

Q. Between you and the Buckley & Sullivan tract, what kind of a fence was that?

A. When we put it up, there was no fence, but we recognized Buckley's line.

Q. Was there any fence there before you?

A. No, sir.

Q. What sort of a fence did you put up?

A. Well, we put up a board fence.

Q. What kind? How many boards?

156 A. I think we put three boards on it.

Q. Take the westerly line of fence between you and the claim of Sproul. What kind of a fence was that?

A. On Sproul's line we did not put a fence up. We made a mark for the line, that portion of it, and I think before we sold we had not put a fence up. The lumber was there to put it up, but I don't think we put a fence up on that line. That is the line; we did not think th re was any necessity for a fence on that; there would be no trouble about it, because Mr. Sproul was one of the owners.

Q. That was the west line?

A. That was the west line.

Q. The southerly line of the fence, what constituted that? How was that?

A. Well, we put the fence upon the northerly line.

Q. Who adjoined you on the north?

A. Well, Mr. Donahue.

Q. On the north?

A. O, on the north; I think it was Buckley and Cashman, or some claim of that kind. I think it was somebody else besides Buckley, if I remember right.

Q. How long a line of fence was that on the north?

A. I could not state how long it was. It was considerable of a fence.

Q. Do you know the Byfield tract?

A. Yes, sir.

157 Q. Between you and the Byfield tract, what was the condition of the fence, and who put it up?

A. Well, we put up the line of fence along the Byfield tract; there had been a fence there; there were indications of a fence at the time, and we repaired it.

Q. Whose fence was that?

A. At that time I think it belonged to Thomas H. Holt, and some other parties. I do not know who the parties were. There were a number of them. I think Eugene Sullivan was one.

Q. Do you know Mr. Perley?

A. Yes, sir; and Mr. Perley I am speaking of the Byfield tract.

Q. You say there was an old fence along that line, and you repaired

A. Yes, sir; we put it in a condition to make a line of fence. I think it was a very bad fence at that time. It was pretty near all gone, except there was some posts, and we followed the line.

Q. To whom, if to any person, did you turn over the house that you spoke of having there, and having a person living in, if to any person?

A. Well, it was delivered to Peter Donahue, by an agent from me. I had it delivered to Peter Donahue by an agent.

Q. What time was that?

A. I could not tell you now.

Q. What year?

A. I could not tell you.

158 Q. Do you remember making a deed to Mr. Donahue?

A. Yes, sir; the deed will show for itself; at that time it was delivered to him, on the next day afterwards.

Q. It was delivered about the date of the deed?

A. Yes, sir.

Cross-examination:

By Mr. HOLLADAY. How long have you been in this city?

A. I have been here since the 17th; I think it was the 17th; I would not be exactly correct about that, but I think it was the 17th of September, 1849.

Q. Ever since 1849. Now what business have you followed ever since that?

A. Well, a great many things.

Q. A great many businesses?

A. Yes.

Q. What business were you engaged in in 1861?

A. I used to be taking up land then.

Q. What is called jumping land?

A. No; I do not know as you would call it jumping land; you cannot jump a thing where there ain't nobody else on to it.

Q. Well, you call it taking up?

A. That is the term I used.

Q. This is the business you were engaged in?

A. Yes, sir.

159 Q. What business are you in now?

A. Living on the interest of my money.

Q. You mean to say that you have money at interest?

A. I have stated it, haven't I?

Q. I understood you that you were living on the interest of your money. Have you money out at interest?

A. That is my portion of the business.

Q. Well, you can answer the question.

The COURT. I think that is a fair answer, unless he is living on the interest of what he owes.

Mr. HOLLADAY. You mean to say, then, that you are a capitalist?

A. Yes; I have capital sometimes.

Q. Where is your office?

A. At my house.

Q. Where is your house?

A. Dolores street.

Q. That is the only business you have; you are not taking up land nowadays?

A. No; 'taint a good business.

Q. When did you give that up?

A. Well, I will tell you when I gave it up. When it did not pay.

Q. You do not make your money that way, then. Did you have anything to do with "taking up" when Col. Ross was engaged actively out there in "taking up" land? Answer, yes or no.

160 A. Well, I cannot say that I did, nor I cannot say that I did not. I was interested with Mr. Ross at one time.

Q. You figured with him a little, did you not?

A. I had something to do with it till I found out he was wrong, and then I quit it.

Q. Did you have anything to do with Charles Duane, in helping to "take up land?"

A. No; Duane had something to do with me.

Q. Did you have anything to do with the Byfield tract, in taking that up?

A. Yes, sir.

Q. And this tract?

A. Two different times, on different periods. I had nothing to do with it. The very minute I found out it was wrong in the Byfield tract then I quit it.

Q. How about that; did you quit this when you found out it was wrong?

A. No; I did not find out I was wrong in this.

Q. You hung on then till you were bought out, didn't you?

A. I sold it out on account of my partners, not on my own account, in order to have a settlement.

Q. Who were they; your partners?

A. I have mentioned their names.

Q. You have mentioned the names of all of them?

A. Yes, sir.

Q. Who furnished the money for that enterprise?

A. Well, I guess I furnished the most of it.
161 Q. John Treat was a partner of yours?
A. Yes; John Treat.
Q. And Mr. Moulton?
A. Yes, sir.
Q. Who else?
A. Mr. Sproul.
Q. You say you took up this tract twice?
A. I did not say anything of the kind.
The COURT. In the Beideman tract, I understood him, he took up twice.
The WITNESS. No; I do not believe I said that, judge; that is a mistake; I suppose on account of his asking me two questions at once.
Mr. HOLLADAY. Did you ever have anything to do with Mr. Ross' row out there in taking up land in 1861?
A. I will tell you what I had to do with it.
Q. Only tell me what I ask you.
A. Yes, sir; I did.
Q. Had you anything to do with Charley Duane's jumping property there?
A. No, sir.
Q. Well, what others did you participate in?
A. No others.
Q. Those are the only ones; how many in all, now?
A. Well, there is two.
Q. Those are the only ones you can think of?
A. Those are the only ones that I had anything to do with, as I state to you now.
Q. Well, which two are those?
162 A. Me and Treat, and them, and this Ross affair, as you say, I was connected with them.
Q. And the Byfield?
A. And the Byfield.
Q. That makes three.
A. No; I say that is the one; the Byfield is the Ross tract.
Q. How about the McCreery tract and Ross' claim on that; did you have anything to do with that?
A. No.
Q. Nor with Duane's?
A. Nor with Duane's; I never had anything to do with it.
Q. How many times have you been a witness on those outside land cases within a year past?
A. That is almost impossible to tell. They will bring a man up here as a witness whether he knows anything about it or not.
Q. Did you ever get any extra pay for your services as a witness in those cases?
A. Well, I never got half enough to compensate me for the time I have spent on to it. I get two dollars a day now, for every day I come here, and that is about all I get from any of them, and a good many times I don't get anything.
Q. You said you knew the Fleishacker tract ever since it was taken up, in 1853 and '54?
A. I have been over it before it was taken up, and afterwards, but I say the first time I knew it was taken up was about that time, about 1854; that is the first time I remember it.
163 Q. Who took it up in 1854, or about that?

A. I do not know.

Q. I would like to know who first suggested this happy idea to you of squatting on it, in 1861, or jumping it?

A. Well, probably it was my own head.

Q. Did Mr. Treat furnish any of the money?

A. Mr. Treat was very poor at that time.

Q. How was it with Mr. Moulton?

A. Moulton did not have much.

Q. How is it with you?

A. Well, I generally have money, or if I do not I have friends that can give it.

Q. They back you up, and then you sort of divide the speculation. Well, you followed an old line of fences there, you say?

A. I told you that on the west I followed an old line of fences, or what I have spoken of. I did not call it a fence.

Q. You said a fence.

A. Well, if I said so, I want to correct it. I say there was a line of brush.

Q. That had been a fence?

A. I do not know that you would call it a fence. It was an old fence or it was a line of brush that had been throwed out and cut on a line. It was made on a boundary, I suppose.

Q. Was it not intended for an old brush-fence?

A. I cannot tell what it was intended for.

Q. What made you call it a fence before?

164 A. If I called it a fence it was because some of you probably make a mistake.

Q. It was not a fence, then; you take that back?

A. I did not say it was not a fence, now. I say it was a line that we followed. I believe that is the language I applied to it.

Q. Then, there was no fence there at that time, you say?

A. Yes.

Q. Did you know Mr. Evans at that time?

A. Yes, sir; I knew him.

Q. He was living on the Fleischacker tract?

A. Yes, sir.

Q. Claiming to be in possession at the time?

A. I will tell you what he claimed; he told me that he was a tenant of Gautier.

Q. Did he tell you so?

A. I do not know as he told me at that time.

Q. You knew he claimed to be a tenant of Gautier at that time?

A. If you will allow me to explain, I will tell you exactly what I know about it.

Q. I do not care about your explanation; I want you to point out on one of these maps where you commenced building this fence.

A. I have told you.

Q. Tell me again; I want to see if you can tell me the same story twice alike, because we do not believe there was any fence built by your folks on the place. Point out where you commenced building the fence across the tract.

165 A. Well I will do it to satisfy you; we commenced up there, (showing on defendants' Exhibit No. 10.)

Q. On the east line, on the Mayer & Fleischacker line?

A. Yes, sir; the Mayer & Fleishaeker line; we built a fence across that way; (making a mark on the map.)

Q. Parallel to the central road?
A. No; we ran across the central road; I can only speak of my idea at that time; I think we ran across that road.
Q. You think you ran across it diagonally?
A. I think it would.
Q. I am asking you what you did.
A. The road was not there then.
Q. You described it now as running across from the northeast towards the southwest, on the line——
A. (Interrupting.) To the southeast.
Q. That is north; (showing;) you run from the northeast towards the southwest, across the blue line near the place marked Central macadamized toll-road?
A. I say I ran across the road here, (showing.)
Mr. HOLLADAY. The witness thinks they ran the fence so that it would run across the present macadamized toll-road.
Q. Where did you run to?
166 A. Well, in that direction; (showing;) it would have been pretty near east straight from this point; (the witness points to the Mayer and Seligman line.)
Q. Where did you bring up with this fence?
A. Well, we ran against Mr. Schaadt, I believe his name is,
Q. You mean the old man Schaadt?
A. Yes, sir.
Q. Where did you go then?
A. Then we came west of it.
Q. You claimed to that; east of that, is that it?
A. Yes, sir.
Q. That is all the fence you built?
A. I told you we made a fence. I do not know whether this purports to be the line.
Q. Mr. Sharp says that this map is all right. You say you ran this fence till you met Schaadt. Do you mean to say you built a fence there?
A. Yes, sir. I was arrested for doing it, too.
Q. Where did you build next?
A. We built the line of fence on this here line of this, (showing,) between this and the place you are trying to put me into. That I was interested in with Duane.
Q. The Byfield tract, you mean?
A. Yes, sir. We then fixed that line of fences.
Q. That would be on which side of your claim?
A. The south side.
Q. How far did you run that fence then?
167 A. We ran along the line of their claim, till we came to Sproul's, to the line he claimed. We ran to the line that they claimed. I guess Mr. Sharp knows about it too—Mr. Wm. H. Sharp.
Mr. W. H SHARP. We had a fence there, did we not?
A. You did have a fence afterwards, but not then.
Mr. HOLLADAY. How far was that?
A. I cannot tell you the distance.
Q. Was it 40 rods do you think?
A. I could not tell you.
Q. Where did you run from there?
A. Down to Sproul's line, till we connected it.
Q. Which way?

A. Well, we ran north.
Q. How far did you run north?
A. I cannot tell you how far we ran north. There is a survey of it, if you will get that. We ran down till we connected with Buckley, and then we ran up till we connected with the claim. That is all I know.
Mr. HOLLADAY. You ran it north?
A. No. We ran south—you might say we ran south.
Q. You came here, (showing,) then here, (showing,) and where from this point?
A. Well, from this up.
Q. That would be north, would it not?
A. If this is north, then we ran north.
Q. Till you struck whom?
168 A. Well, I could not tell that time who owned it.
Q. It was a little mixed?
A. A little mixed as to who owned the land.
Q. Who claimed it?
A. Well, Mr. Buckley; that is where we claimed; up to Buckley's line.
Q. Along this west line was the remnant of that old line of fence, you say?
A. No, sir.
Q. Where did you run on the line of the old fence?
A. I have showed you; it was across here, (showing.) I would not say it was a line of fence. I stated to you before it was a line of brush that had been cut and laid along there to make the line.
Q. Then it was not a fence at all?
A. Well, if it was a fence, you could drive over it, Mr. Holladay, at any place you pleased.
Q. Who, also, was out there on the ground, beside yourself, while that fencing was going on?
A. Mr. Sproul.
Q. The old man here?
A. No; Mr. Sproul—Sproul. He is dead now, I believe.
Q. Well, I always got him mixed with Mr. Schaadt. You were there, and Sproul. Now, anybody else?
A. Well, I think the morning we had the difficulty with Mr. Donahue we did not have anybody there. Nobody.
169 Q. You mean that at the time of the difficulty with Mr. Donahue there was nobody there but yourself?
A. And Sproul; I think so.
Q. Was Treat on the ground?
A. No; he was not on the ground at that time.
Q. Was he at any time while you were fencing?
A. Certainly.
Q. How many times?
A. Well, just as often as any of the rest. We done a good deal of work there; all of us worked ourselves.
Q. You did it pretty rapidly, didn't you?
A. No, sir; we were in no hurry at all.
Q. How many days were you at it?
A. I do not remember. I could not state myself how many days.
Q. How many times were you arrested in the operation?
A. I never was arrested, only once, and then we was discharged.
Q. (Interrupting.) Now, then, the whole interval from the time you

commenced your fencing till Mr. Donahue went on there, till you gave that deed to Mr. Donahue, what was that time?

A. I could not tell.

Q. Was it a month, putting it all together?

A. Oh, yes; a good deal more than a month.

Q. Are you sure?

A. I know it was.

Q. Did you ever complete that enclosure?

170 A. I could not tell you now whether we did or not.

Q. You cannot say that you did, can you?

A. I think we did go and make an enclosure of it afterwards, but I think that was something we had to do providing to make this——

Q. (Interrupting.) To make the claim good?

A. No; it was not that.

Q. What did you do it for?

A. I think there was some agreement between us and Donahue, that we should make it a perfect enclosure.

Q. Before you sort of sold out to him?

A. No; it was after that.

Q. What was it for?

A. It was to secure the property.

Q. Secure what property?

A. That that we sold.

Q. The property you had fenced in?

A. The property that we purported to fence in, that we were going to fence.

Q. How many acres did you fence in?

A. Well, if you will go and get the map you can tell how far. We had a survey of the land, and put the fences on the survey as near as we could.

Q. I did not ask you about a map; I ask you how many acres did you fence in?

A. I said——

Q. (Interrupting.) Do you know or not?

A. I tell you I could not tell.

171 Q. What was the shape of the tract you professed to fence in?

A. Well, it was very nearly a square in shape, of an oblong——

Q. Then it was not a square?

A. It was nearly square, but sort of oblong.

Q. Whom did you claim to own under on that occasion?

A. We claimed under ourselves.

Q. Sort of a jump?

A. No, sir; I think it was taking the property up; it was lying there vacant.

Q. You knew it had been taken up in 1854?

A. No, sir; I did not know it at all.

Q. Didn't you know that Mr. Donahue claimed the land?

A. No, sir; for I made the arrangements for Mr. Donahue to buy the land.

Q. And then afterwards you went and jumped it?

A. No, sir; I made the arrangement for him to buy with the man he bought of.

Q. With whom did you make that arrangement?

A. Mr. Duprez.

Q. The broker from whom he bought?

A. Yes, sir.

Q. And Mr Donahue went and bought on the strength of that arrangement?

A. I expect it was.

Q. Then you went immediately and jumped it?

172 A. No, sir; we had possession of it before.

Q. Did you make an arrangement for him to buy that?

A. Not this tract; he was buying the whole tract.

Q. Including this?

A. No, not including this; he was buying the Fleishacker tract.

Q. How many acres?

A. I guess what he had inclosed, the way I looked at it.

Q. That was the arrangement you made with Duprez to buy. Did you make the arrangement as to what price he was to pay?

A. I made the arrangement of what price he was to pay for what Fleishacker had.

Q. That was before you put on the fence?

A. No, sir, nothing of the kind.

Q. Well, then, it was after you put on the fence?

A. Yes, sir; he came to me himself, or they did.

Q. Was it before you made the arrangement that he went there?

A. No, sir, it was afterwards.

Q. Then you went to the broker about it?

A. I did not do anything of the kind; the broker came to my house.

Q. To buy you out?

A. No, sir; he came to buy Mr. Fleishacker out; you will get right after a while.

173 Q. Did you recommend to Mr. Donahue to buy the Fleishacker claim?

A. No, sir; he brought the men there, and the words he used were, "Now, I will settle on what Thompson says the land is worth."

Q. Who said that?

A. Mr. Donahue. Then he went out and left me and Duprez there together. I told him I thought the land was worth about $30 an acre. It appears that there was some debt between him and the party that owned it, and he was getting this in order to cover himself.

Q. Mr. Donahue?

A. Yes, sir.

Q. That is, he bought out your claim to secure his title?

A. No, nothing of the kind. I say he was buying that claim to cover some debt of these parties; that Gautier owed him for a quartz-mill, or something of that kind; I do not remember what it was.

Q. Mr. Donahue took the land for a debt, is that it?

A. I think, probably.

Q. That is, when Mr. Donahue bought from Gautier, as you understand, he took it for a debt, and that is the time you recommended Mr. Donahue to buy—is that it?

A. Yes, sir, that is correct.

Q. Did you tell him the title was all straight and good?

A. I did not tell him anything at all about it.

174 Q. Did you tell him that you knew anything about Fleishacker having an earlier claim to it?

A. I told him what I knew of the Fleishacker—what I knew of it.

Q. Didn't you tell him it was one of the earliest claims and locations in the city here—in the Western Addition?

A. I could not tell you what I told him.

Q. Did you tell him that Gautier had the Fleishacker title?

A. Well, I did not get anything for what I did, or anything of the kind; and, therefore, I don't suppose I interested myself one way or the other. I merely told him what I thought it was worth.

Q. Did you not tell him that Evans was there under Gautier, and that he could safely buy it?

A. I think Evans himself came down.

Q. At the negotiation?

A. I think Mr. Evans told me that he would deliver him possession.

Q. Evans told him that he would deliver him possesion?

A. That he would deliver him possession.

Q. And that he was a tenant of Gautier?

A. Well, now, I do not know that.

Q. When was that; before or after you had commenced building that fence out there?

A. Well, it was afterwards.

Q. This was all after you commenced building the fence out there?

175 A. Yes, sir.

Q. You did not tell Mr. Donahue that; now, are you sure of that?

A. I am just as certain as I am talking to you, of what I say.

Q. Did you tell Mr. Donahue that you had a fence built out there?

A. Did I tell him? No; it did not interfere with him.

Q. Your first answer is that you didn't?

A. That was our matter. Well, I do not know that that subject ever came up at all.

Q. Mr. Donahue testified this morning that he had no idea you were out there making any claim. Is that true?

A. Very probable; I think that is true.

Q. Did you tell him how much Gautier had out there in possession?

A. I did not know myself.

Q. Didn't you know what Gautier was going to sell him, or anything of the kind?

A. Nothing of the kind. I was merely putting the price on the property.

Q. Did you know how much Gautier had in possession?

A. All I knew was what I saw fencedin there.

Q. When you went out from time to time?

A. What time?

Q. At the time you jumped, then, didn't you know that Gautier had been claiming that land for years?

176 A. No, sir; I knew Evans went himself and took a piece up outside of that and put a fence on it.

Q. I am not speaking of that, but inside of this tract. Do you mean to say you want this jury to believe all you say, that Gautier was claiming this land, that you did not know he was claiming it before you built this fence?

A. Nothing of the kind.

Q. You never heard of it?

A. No, sir.

Q. You are quite familiar with the land, and have been over it frequently, and visited it often; and yet you never heard that Gautier claimed out there anything except this little patch?

A. No, sir.

Redirect examination:

By Mr. S. A. SHARP. In all your jumpings, did you ever jump a city-plaza or a school-lot?

A. No, sir.

JOHN TREAT, called for defendant, sworn, examined.

By S. A. SHARP:

Q. Did you know the ranch called the Belvidere ranch?

A. The Donahue tract?

Q. Yes.

A. Yes, sir.

Q. Are you the person mentioned in the deed to Peter Donahue from John Treat, John Sproul, Andrew Thompson, and James Moulton?

A. Yes, sir.

177 Q. What did you ever do upon those premises by yourself or in connection with those other persons I have mentioned?

A. I built a house upon them.

Q. What kind of a house?

A. A framed house.

Q. Give us about the size and character of the house.

A. Let me see; I think the body of the house was probably about sixteen by eighteen feet, something in that neighborhood.

Q. Did anybody live in the house?

A. Yes, sir; we had a man by the name of Waters, who lived there a portion of the time; we also cleared off quite a large piece around the house.

Q. Waters cleared off a piece of ground?

A. Waters and a man named Sproul, who is mentioned in the deed.

Q. How long was this house built before the deed to Donahue?

A. I think probably a month or two; it may be longer.

Q. Was there any fencing made; if so, by whom?

A. Yes; we had some fencing and repaired some fencing.

Q. Did you make any enclosures?

A. Well, I think on the north of the tract we repaired the fence; that was claimed by Buckley and others.

178 Q. Do you know Buckley's other name; what Buckley it was?

A. Well, I think it was Buckley and Sullivan that claimed the tract.

Q. Buckley that was killed on the Camanche?

A. I think so; the same. On the south we repaired the fence dividing the tract from what is called the Byfield tract.

Q. On the east?

A. On the east we built; on a portion of the line we built a board fence—a slight fence; and my impression is that we built a brush fence, and stakes up to the south line of the claim; we marked it off; that is my recollection.

Q. You say on the west; who was adjoining you on the west?

A. Mr. Sproul.

Q. The same Mr. Sproul that was interested in this other claim?

A. Yes.

Q. About how many acres did you have there or claim?

A. Well, I don't remember now; we had it surveyed.

Q. About how near was your east fence; do you know the house that Evans occupied?

A. Yes, sir.

Q. About how near was your east line of fence to Evans' house?

179 A. Running north and south I think it must have been two or three or two hundred yards; something about that distance; somewheres about that distance, more or less.

Q. Did that line of Evans connect with the north and south line of your fence; the fence you built there?

A. Yes, sir; the northern portion of this north and south line was a board fence; the southern portion I think was. The fence was not completed; it was marked out, and I think some brush was cut and stakes driven down.

Q. Who built that east line of fence?

A. That was built by the company.

Q. By you and Sproul and the persons you have named?

A. Yes, sir.

Q. Do you know the tract as fenced at present by what is called the Donahue fences?

A. I do not know that. I do know the boundaries of it; I know about where the tract is.

Q. You know about where the fence is now?

A. Yes, sir; I have rode along there frequently.

Q. I will ask you if in 1861 there were, when you first went there, any fences on the premises corresponding to them, to what is now called the Donahue fences, or anything like it?

Mr. HOLLADAY. He says he don't know where the Donahue fences are.

WITNESS. I say I know about where they are, I think; I won't be positive about the eastern line; my impression is that on the eastern line the fence is now in about the same place.

180 Q. That is the line between the Belvidere ranch and the Seligman & Meyer tract?

A. No; the west line. I will correct that, the west line; I think the west line is about the same position.

Q. (Interrupting.) Which is the west line?

A. When I speak of the west line, I mean the west from where we built our house; west from that point, or west from where Evans lived, running north and south.

Q. You mean the line between the Sproul and Donahue tract?

A. Yes, sir.

Q. Were there any fences there when you went there?

A. There was a portion of a fenc*h*, or a brush fenc*h* marked out.

Q. How far did it extend?

A. It extended up to the Buckley claim, I think.

Q. Was that east or west of where you had your house?

A. West.

Q. Whose fence was that? Who put that fence upon it?

A. That was claimed by Sproul.

Q. Who claimed the adjoining claim, immediately west of this Donahue claim?

A. Sproul.

Q. Now, was there any fence? What was the condition of what
181 is called the Belvidere ranch except the Evans house, and the fence immediately enclosing the Evans house? What was the condition of the Belvidere rancho in 1861, when you went there, in reference to fences?

Mr. HOLLADAY. I think that is immaterial; we both claim from one common source of title, from the Fleishacker claim.

The COURT. On the other trial they took the ground of abandonment. If it is on the question of abandonment it is proper.

WITNESS. Well, I would have to understand what the Belvidere ranch is first, before I can answer; that is, the boundaries of it, in order

to answer the question; if you mean the piece that was sold to Donahue —if you call that the Belvidere tract, I can answer.

Q. Assuming that to be a part of it, what was the condition of that tract?

A. That was all, with one exception of the north of it, that I speak of, there was a post and rail fence partially; well, there were parts of it down.

Q. (Interrupting.) Built by whom?

A. I do not know; it was claimed by Buckley and Sullivan, I think; on the south was the Byfield tract; there had been a fence there that was dilapidated.

Q. What was the condition of that fence then?

A. Dilapidated.

Mr. HOLLADAY. That was on the south?

A. Yes, sir.

182 S. A. SHARP. Who claimed that fence then?

A. I do not know who built it; it was known as the Byfield tract; there had been some time a fence there, but stock could get through it; it did not stop people from traveling.

Q. Did you know the land prior to 1861?

A. I have rode over it frequently.

Q. How early did you know it?

A. Well, I would not say; I have rode over there after berries very often.

Q. About how early?

A. From probably 1852, down quite a number of years; I have rode across it to the Presidio.

Q. Did you know Samuel Fleishacker?

A. No, sir.

Q. Did you know where he lived during 1852, '53, and '54?

A. No, sir.

Q. Who succeeded, or to whom did you deliver this house you spoke of?

A. I delivered it to Mr. Donahue.

Q. Peter Donahue? Well, did you have any difficulty with Mr. Donahue before you made a deed to him?

A. Yes, sir; we had a little riot.

Q. Were you arrested?

A. I am not certain whether I was arrested or not. I think I was.

Q. Was Mr. Donahue arrested?

183 A. Well, if I was arrested, I was arrested at the instance of Mr. Donahue. I am not certain whether I was arrested or not.

Q. Do you know whether Mr. Donahue was arrested.

A. I think not.

Q. What was the occasion of your being arrested? What did you do, if anything, to Mr. Donahue on his ground?

A. Well, I was not on the ground, and therefore I do not know whether I was arrested or not. I know I was in the court-room, and I think an officer came and arrested me. I am not positive. It seems that Mr. Donahue, whilst our men were fencing, came out with some lumber, and I think his attorney was with him. I am not positive now. I was not on the ground. He had a conversation with Mr. Thompson about putting up some fence on the north line of the tract, and I understood from Mr. Thompson that they agreed—Mr. Donahue and Mr. Thompson did—that he should put up some posts and Mr. Thompson should tear them down; and I think Mr. Donahue put up one or two

posts, and Mr. Thompson tore them down, and then I think Mr. Donahue went into town and got a warrant out for Sharp, Moulton, and myself. I am not positive, but that is my recollection. The case was tried and dismissed.

Q. Was Mr. Donahue resisted by any person for building fences there? If so, by whom?

A. Yes, sir; he was resisted by Mr. Thompson.

184 Was it by agreement between Thompson and Donahue that Donahue was to be resisted?

A. I think that is what Mr. Thompson told me—that is my recollection.

Mr. HOLLADAY. It was a sort of plan made right there.

A. Well, I think Mr. Donahue thought he could get some advantage by it; by having a complaint made and the parties arrested, he could go on and build his fence. That is what I heard.

S. A. SHARP. Advantage of whom?

A. Advantage of Mr. Thompson and myself, in constructing the fence.

Mr. HOLLADAY. And then buy them out?

A. I do not know.

S. A. SHARP. Then I understand you that Mr. Thompson agreed to have a sham opposition to Mr. Donahue?

A. To give him what advantage he could make out it. I should say so as to see if he could get an advantage. Mr. Thompson thought he could obtain no legal advantage, and perhaps Donahue thought he could in that way.

Q. So as to enable him to buy you out.

A. No; I think not.

Q. Well, what was the object of it?

A. The object was to get possession, I suppose.

Q. Was is to test the right of possession, or who had the possession?

A. Probably.

185 Q. Did you claim possession then?

A. Yes, sir.

Q. And did he claim the right to it?

A. Yes, sir.

Q. And this was in order to test the right of possession without having a breach of the peace?

A. Well, as I would put it up, it would be this way: that he thought he could not recover possession, could not recover possession——

Mr. HOLLADAY, (interrupting.) That will do.

WITNESS. Well, I cannot tell what the man thought. I can only give what is reasonable to suppose.

S. A. SHARP. It was to test the right of possession, then, without making a breach of the peace?

Mr. HOLLADAY. The witness could not answer that.

S. A. SHARP. Well, do you know anything about it?

A. No, sir; I was not there.

Cross-examination:

By Mr. HOLLADAY. Have you any data whereby you can locate the time when you commenced out there for the first time?

A. I have not, not to a day, but very near.

Q. Well, get it as near as you can.

A. Well, I think it was somewhere about May; I think so.

Q. Of what year?

A. 1861.

186 Q. Do you remember whether it was before or after Mr. Donahue bought?

A. Well, it was before he bought from us; I am certain of that.

Q. Now, don't you know it was after he bought from Gautier?

A. I do not know anything about his purchase from this gentleman you speak of; I do not know that he ever did buy it.

Q. He bought from Gautier on the 23d of May, 1861. Was it after that?

A. I could not say, sir.

Q. Do you remember when you sold out to Donahue?

A. Well, I think about July somewheres, probably.

Q. Then, the history of your achievements and sufferings in that claim ran from May to July, did it?

A. Through several months.

Q. Now, won't you tell who was the prime mover in this little plan to take possession of the Belvidere ranch? On your part I mean—you and Thompson and Moulton. Who first suggested it to you?

A. Mr. Sproul.

Q. He was a policeman at that time, was he?

A. No, sir.

Q. Has he been?

A. I think not.

Q. Was he since?

A. He has been. He was.

187 Q. Mr. Sproul suggested it?

A. He showed me the land and showed me the condition of it; I saw it was unoccupied land.

Q. Who brought Andy Thompson to you in relation to this land?

A. Well, he was connected with me in another tract of land.

Q. Which tract was that?

A. That is called the Treat tract now, west of that.

Q. Still further west?

A. Yes, sir.

Q. Mr. Thompson said you were poor at that time, and he furnished all the money for this enterprise—or he presumed he did; how is that?

A. Well, there was not very much money in the firm, I think, about that time, altogether, if I remember right.

Q. It was a sort of enterprise or speculation in which there was small capital and quick returns?

A. That is the idea, sir.

Q. Now, Mr. Treat, do you know who took the lumber out there for that fence?

A. Yes, sir.

Q. Who did?

A. Let me see. (A pause.) I do not remember who hauled the lumber.

Q. Do you remember where you bought the lumber?

A. I remember I hauled some of it.

188 Q. Do you remember where you bought it?

A. Well, I remember that a portion of it was a house that belonged to Sproul, taken from his place, that was taken down and hauled out.

Q. From which direction?

A. That was from back of the mission.

Q. That is what Sproul contributed, the house?

A. That is his portion of it.

Q. What did you contribute?
A. I do not really remember now how much I did contribute.
Q. Do you remember what Andy Thompson contributed, or did he only contribute hard work?
A. Well, I think Andy contributed some lumber. We contributed labor and some money.
Q. Did Evans come into this little arrangement?
A. No, sir.
Q. You know the old man by sight?
A. I know him by sight; yes, sir.
Q. Do you remember talking with him about allowing Donahue to slip in there and buy you and him out?
A. No, sir; I never talked with him about it.
Q. He did not talk that way to you?
A. No, sir.
Q. Thompson says he had just advised Mr. Donahue to buy out Dr. Gautier, and go in there ahead of you; how was that?
189 A. I never heard of that; never till now.
Q. Your whole standing there was during that short interval? Was that house built while you were there?
A. No, sir; it was not finished.
Q. Was the roof put on?
A. I think not.
Q. Did you live there?
A. I did not reside there; I went there frequently.
Q. A sort of formal call?
A. We made a possession. I worked there; grubbed up some of the brush.
Q. You worked yourself at grubbing up brush?
A. Yes, sir.
Q. That was for the purpose of giving the appearance of bona-fide possession?
A. Yes, sir; to show that we were in earnest.
Q. You took off your coat and went at it?
A. Yes, sir.
Q. Did Andy work any?
A. I think so; a little.
Q. That was the first time you ever knew him to work in his life, was it not?
A. No, sir; Andy has worked quite often.
Q. Did Mr. Moulton work any out there?
A. Yes, sir.
Q. What did he do?
A. Assisted in cleaning off the tract.
Q. How much did you clear off from that tract?
190 A. Mr. Sproul worked some too; we all worked; went on the ground and worked; showed ourselves.
Q. You were in actual possession about that house?
A. Yes; I think there was probably an acre or more cleared off; may be; I think probably about three acres; there was quite a large piece that we cleared off.
Q. You say you repaired the fence on the north?
A. Yes, sir.
Q. And in the south?
A. Yes, sir.
Q. And on the west?

A. The fence on the west was a line fence of the tract claimed by Mr. Sproul, and that we did not build.

Q. That was already built?

A. That was not much of a fence; it was a line.

Q. That you did not interfere with?

A. I think perhaps we might have cut a few brush; we might have went over the line.

Q. You did not make any wooden fence?

A. On that side; no, sir.

Q. Did you make a wooden fence on the east?

A. A portion of the way we might possibly have made a fence on the east; the balance, where we left off with the wooden fence, my recollection is, we cut some brush and made a brush fence. There was a portion of an old fence, that probably had been there.

191 Q. You ran along the line of that to build?

A. There had evidently been a brush fence there a number of years before.

Q. In what direction did that old fence run?

A. North and south.

Q. Square north and south?

A. I would not say square; but the general direction tended north and south.

Q. Leaving the Fleishacker house, wherein Evans was living at the time, to the east of it?

A. Yes, sir; about two hundred yards, my recollection is. I would not say but it might be more, or less. I have not refreshed my memory or looked at it from the time.

Q. Did you see Evans there at the time those improvements were going on?

A. I think probably.

Q. You do not remember distinctly?

A. I do not remember, because I have no distinct recollection of seeing Evans there.

Q. Was that improvement all carried on in the day-time?

A. Yes, sir.

Q. Every bit of it?

A. All carried on in the day-time.

Q. Did not Mr. Evans make any objection?

A. Not to my knowledge.

Q. Was there any road left open through, running across the lot, after you got there?

A. Well, during the time we were there the fence was not all complete, I tell you.

Q. You never completed the enclosure?

192 A. We never completed the enclosure.

Q. Now, Andy Thompson says he resided in that house; how is that?

A. Well, it is possible he may have slept there.

Q. He says Moulton resided in the house a part of the time, too?

A. Mr. Moulton worked there a portion of the time, but I not know that he—what you might call—resided there; he did not make that his home, it was not his residence.

Q. Did you have any beds in that house?

A. I think there was.

Q. You got the bed in before you got the roof on?

A. Yes, sir; I think that our man, Waters, slept there; that is my recollection.

Q. He was the servant?

A. The hired man.

Q. So you sort of fenced off the old Fleishacker improvements and left them on the east, and took possession on the west; that is your idea?

A. That is our idea; yes, sir.

Q. And divided the land between you, between man and man. I will ask you one more question; do you remember how much Mr. Donahue paid to buy you off there?

A. Three hundred dollars.

Redirect examination:

By Mr. S. A. SHARP. You say there was not much capital in the company at that time?

193 A. It was light.

Q. Have you not known quite as extensive claims to be taken up and held by such small beginnings?

Mr. HOLLADAY. That is hypothetical and historical. Dwinelle's "Colonial History" will show that.

Mr. S. A. SHARP. Your very rich lawyers commenced in a small way by taking up land, did they not?

A. I think you had better, perhaps, ask some of the attorneys about that.

LEOPOLD MARKGRAF called for defendants; sworn, examined:

By Mr. S. A. SHARP. Do you know what is called the Belvidere ranch?

A. No, sir.

Q. Do you know what is called the Donahue tract up there?

A. Yes, sir.

Q. When did you first know it?

A. I know it since 1861.

Q. Did you ever do anything out there towards making improvements of any kind?

A. Yes, sir.

Q. What?

A. I built a fence for Mr. Donahue; built a house, and repaired a house.

Q. What fences did you build; do you know the fences as they are now?

A. Yes, sir.

194 Q. How did the fences you built correspond with the present fences?

Mr. SHARP. Tell us what you did.

A. I built a fence between Meyer and Seligman's, and built a fence in between Buckley's—Buckley and Sullivan's and Cashman.

Q. Then what other fences did you build?

A. And then I built a fence in between—I don't know whether Sproul or Riley; in between Riley and Sproul, I am not sure it is the same party.

Q. You mean between those claims and the Donahue claim?

A. Yes.

Q. Now, what other fence did you build?

A. A part of it in between Schaadt.

Mr. HOLLADAY. Between Donahue and Schaadt?

A. Yes.

Mr. SHARP. What kind of a fence did you build?

A. I built a four-rail fence with a cap on, three rail and a cap, and used old portions of the fence right straight along, leaving the old fence in what was in it, nailed it right to the new posts what was there.

Q. On which line of fence did you find an old fence?

A. The north side.

Q. Next to what claim?

A. To Donahue's.

Q. I know, but whose claim joined on the north?

195 A. With Buckley; Buckley and Cashman and Sullivan.

Q. Do you know the fences as they are now? In the first place, I will ask you what became of the fences you built?

A. Well, I guess they is there yet.

Q. How long since you were out there?

A. Since 1860.

Q. Have you been there recently?

A. I was building. I guess in 1861 I built a fence.

Q. Since 1861 have you been there?

A. Yes, sir.

Q. Well, occasionally to the present time?

A. Once and a while, going back and forward.

Q. And the same fences you built are there yet, or were there when you were there?

A. Yes, sir.

Q. What other improvements, if any, did you put upon the premises?

A. Well, I repaired one of the houses and put an addition to the other house that was built.

Q. Who, if any person, lived in the house you speak of?

A. At the time I repaired it there was nobody living in it.

Q. Who lived in it afterwards?

A. Afterwards? Mr. Sherman was living afterwards in one.

Q. When was that?

196 A. That was right after Mr. Donahue bought the place. Mr. Evans left the place and then Mr. Sherman moved in.

Q. Then it was a house that had been occupied by Evans?

A. Yes, sir.

Q. When you built these fences did you find any fences except on the north line? If so, on what line?

A. Short posts and rail on top.

Q. What line of fence is that?

A. It is the north line of the fence.

Q. Did you find any other remnants of old fences along the lines you fenced?

A. I think all along was fencing.

Q. Remnants? What did you find?

A. I found fences all around; all pieces—parts.

Q. Give us some idea as to the condition of fences you found.

A. It was short posts, and some rail on top—some scantlings.

Q. Was it in good repair, or out of repair?

A. It was in bad order. Some parts was carried off.

Q. Did you build new fences, or repair the old?

A. Built new fences.

Q. Then these old fences were not worth repairing, were they?

A. No, sir.

Cross-examination by Mr. Holladay:

You went there to build these fences for Peter Donahue, did you?

197 A. Yes, sir.

Q. What month and what year?

A. It was in the spring of 1862.

Q. Had you ever been there before?

A. Yes, sir.

Q. And when?

A. In 1860 and 1861 I was there every day, many times.

Q. You were there every day in 1860 and 1861?

A. Yes, sir.

Q. Who was on the land then?

A. Evans.

Q. The same land you fenced?

A. Yes, sir.

Q. How many times have you been there since you made that fence?

A. I was there in 1862. I was there up to 1865, every day, through the place.

Mr. S. A. SHARP. You lived there?

A. Next to it. I lived on Buckley's place.

Q. What enclosures, if any, were on the Fleishacker tract in 1860? You say you were there in 1860 and 1861.

A. That is, around the house—around Evans'?

Q. Around Evans' house?

A. About six or eight acres.

Mr. HOLLADAY. How much was there outside of that that Evans claimed?

A. What Evans? I don't know how many acres. I can't tell you.

Q. How big is an acre square?

198 A. About half a block.

Q. Do you know how many feet it is on each side?

A. Yes; I know about the measurement of the blocks.

Q. No; but do you know how many feet square composes an acre?

A. About one hundred and twenty feet.

Q. Did you complete that enclosure you built for Donahue?

A. Yes, sir.

Q. How many houses were there on either side of it when it was completed?

A. Two.

Q. How far were they apart?

A. They were apart about a quarter of a mile.

Q. The house which you repaired, was that known as the Fleishacker house?

A. Yes, sir.

Q. Quite an old house?

A. Oh, pretty good condition, so far inside.

Q. I mean it looked as though it had been there a number of years, didn't it?

A. Yes, sir.

Q. What sort of a house was the other one?

A. One-story house; two rooms.

Q. What was it made of?

A. It was made out of lumber.

Q. Boards?

A. Yes, sir.

Q. Was it lathed and plastered?

199 A. No, it was paper.
Q. What was the size of it?
A. It was four rooms and a kitchen.
Q. I thought you said it had two rooms.
A. I put on an addition; then it was four rooms and a kitchen.
Q. You put on an addition and that made four rooms and a kitchen?
A. Yes, sir.
Q. But there were two rooms when you first went there, built with boards and lined with paper.
A. Yes, sir.
Q. Was there any chimney in it?
A. Yes, sir.
Q. Before you repaired it?
A. No, sir.
Q. Was it on a brick foundation?
A. No, sir.
Q. Was it shingle or a board roof?
A. Shingle-roof.
Q. Were there any buildings about it; any out-buildings?
A. No, sir.
Q. That was in the spring of 1862, you say?
A. 1862.
Q. You cannot remember the month?
A. Not exactly.
Q. Are you a carpenter?
A. Yes, sir.
200 Q. The house to which you added the two rooms and kitchen, what was the value of that house before you commenced to add to it?
A. Well, about one hundred and fifty dollars.
Q. What was the cost of the addition you made to it?
A. A couple of hundred dollars.
Q. What did you do in the way of repairing the old Fleishacker house?
A. Boarded it on the inside; the whole house was all open; there was no wall in it at all.
Q. You boarded it on the inside. What else did you say?
A. Boarded inside around, wainscoted all around, lined with boards.
Q. What else?
A. That was all and fixed it up.
Q. What amount of expenses did you devote to that?
A. That was great expense; about five hundred dollars.
Q. Was that all you did in the way of repairs or building?
A. That was all.
Q. You have been there frequently since?
A. Yes, sir.
Q. Have there been any other buildings put on there since?
A. Well, I cannot tell you now, what is lately put up there; it is all cut up; the park going through and so on; I could not——
201 Q. (Interrupting.) Do you remember whether or not there are any other buildings on the tract now?
A. Not now.
Q. You don't remember?
A. No, sir.
Q. Although you have been there frequently?
A. I go not so far out.

Q. What was the cost of the fencing you put on there for Mr. Donahue?

A. That I cannot tell you; I do not know how many thousand feet of lumber went there.

Q. You are a carpenter?

A. Yes, sir; I do not know exactly the measurement; if I made the measurement I can go and tell you every foot that was on.

Q. Can you tell me what length of fence you built upon that occasion?

A. I never measured it and cannot tell you what was the length.

Q. Can't you approximate to the cost of that fence you built for Donahue in 1862?

A. I cannot tell exactly.

Q. Do you think it cost five hundred dollars?

A. Oh, it cost more than five hundred dollars.

Q. Did it cost eight hundred? Would it cost twelve hundred?

A. I would soon believe twelve hundred; I was long enough working at it, putting it up.

Q. You think it cost as much as twelve hundred dollars?

A. Yes, sir.

Q. More than that?

202 A. About twelve hundred dollars.

Q. That is your best estimate as a carpenter, is it?

A. I never measured it. I got the lumber sent there, and then I put the fence up.

Redirect examination:

By Mr. SHARP. How long were you putting up the fence?

A. I was working at it about two months.

Q. How many men were there that helped you?

A. Four men—I mean three men.

Q. You and three men?

A. Yes, sir.

Q. It took you four two months to build the fence?

A. Yes, sir.

Q. About how many miles of fence did you build?

A. I don't know.

Q. About how many acres did it enclose?

A. I don't know; two hundred—I don't know exactly how many acres.

Q. When you speak of twelve hundred dollars cost, do you include the cost of the labor in building the fence?

A. Cost of lumber and labor.

Q. And you think twelve hundred dollars would cover the expense of such a fence?

A. No, sir.

203 Q. Was not the fence you speak of built in 1861 instead of 1862—in the spring of 1861 instead of 1862?

A. I don't remember exactly the day.

Q. Did anybody interrupt you in fencing, while you were building the fence?

A. No, sir.

Q. You cannot fix it, whether it was in 1861 or 1862?

A. I am not sure now. I have got a memorandum; I got the book to-day; but I am not sure now—1861 or 1862.

Q. You did not buy the lumber for the fence?

A. No, sir.

Q. Nor the nails?

A. No, sir; nothing at all.
Q. Nor the posts?
A. No, sir; nothing.

FREDERICK KILLIAN. called for defendants, sworn, examined.

By Mr. S. A. SHARP. Do you know what is called the Belvidere ranch?
A. Yes, sir.
Q. Did you ever live in that neighborhood?
A. It is out behind the Sans Souci.
Q. Did you ever live in that neighborhood?
A. Yes, sir.
Q. Where?
A. One time in Sans Souci, and then, afterwards, between San' Souci and the Fleischacker place.
Q. When did you live on the San' Souci place?
204 A. The commencement of 1853.
Q. Did you know what is called the Belvidere or Fleishacker tract as early as 1853?
A. Yes, sir.
Q. And ever since that time? What was the condition of that tract with reference to improvements when you first knew it?
A. Well, there was a cottage-house on it and stable.
Q. The same house that is there now?
A. Yes, sir.
Q. Is the stable out there now?
A. I was not out there in a long time.
Q. What fences, if any, were about those premises?
A. Around the house was about seven or eight acres fenced in, a ditch and high brush fence.
Q. There was an enclosure around the house, you say, of eight or ten acres?
A. May be that.
Q. What was that fence built of?
A. Brush, the most part.
Q. Anything else?
A. On the front, on the side of the road, there was a ditch and brush fence inside of it.
Q. Was there any other enclosure on that place during the years 1852, 1853, 1854, and 1855, than the other you have spoken of?
A. After a man named Evans went there, I think it was in 1856 or 1857, it was improved all the time a little more.
205 Q. About how much more in 1857?
A. About an acre, about every year or two.
Q. After 1857, or before?
A. 1857.
Q. You mean the fence was extended to take in more land?
A. To take in more land on account of the cultivation.
Q. Up to 1857, was there any enclosure except the one around the house, which you say included eight or ten acres? If so, tell us what there was.
A. Well, it was Myer's tract; was a kind of wire fence, a part of it, and Crochet had a board fence there in that direction, far out.
Q. Crochet had a board fence?
A. On one side.

Q. Speaking of the Fleishacker tract, you say there was an enclosure in 1853 of eight or ten acres?

A. Seven acres.

Q. What was there there in 1854?

A. The same.

Q. 1855?

A. The same.

Q. 1856?

A. 1856; I don't remember there was any improvement made on it then; in 1853 there was some hogs out there.

Q. In this enclosure?

A. No, sir; outside.

Q. Running loose? Now, 1857.

206 A. There was no improvements made there much till Evans came. He came there in 1857.

Q. You think that was in 1857?

A. Yes, sir.

Q. What additional improvements did Mr. Evans make, in 1857, around the house?

A. He had plowed up about two acres of land and put another brush fence around it, and raised potatoes.

Q. Put a brush fence around and cultivated it?

A. Yes, sir.

Q. In 1858?

A. In 1858 he took in an acre more on one side.

Q. In 1859?

A. I was not there in 1859 much; I was in the city then.

Q. When did you cease to live in that neighborhood—stop living out there?

A. I was living out there five years ago yet; six years ago yet; then I went in town, came to the city hall, and got my brother-in-law on the ranch, and was living down here, and every Sunday I came out there.

Q. During 1853, up to the time you left there to come into the city, were you on these premises often? If so, how often? Did you have occasion to pass over them often?

A. In 1853 to 1857, I passed there pretty near twice a week; my horses ran over there in that direction.

207 Q. How far was the Fleishacker house from where you lived at the Sans Souci house?

A. I was living there only a few months in 1853; afterwards I moved back on Lone Mountain. That was about a half a mile from the Fleishacker place. I moved further out; about a mile.

Q. What time did you move to Lone Mountain?

A. I have been off and on there every day from 1854 to about 1865.

Q. From 1854 to 1865 you have been there nearly every day?

A. Yes, sir.

Q. Do you know of any improvements put there by Donahue?

A. Yes, sir.

Q. When were they put there?

A. I had a lot of fencing laid on my ground once. I thought it belonged to me, and found it belonged to the Belvidere ranch. I inquired of the man where it goes to, where it belongs to.

Q. When was that?

A. About 1860 or 1861?

Q. Where was that on the Belvidere ranch, with reference to the Fleishacker house—how far off?

A. Not quite a half a mile.
Mr. HOLLADAY. To the west?
A. Yes, sir.
Mr. SHARP. Do you know the Sproul claim?
A. Yes, sir.
208 Q. Your house was on the road, wasn't it?
A. Yes, sir.
Q. What became of the house?
A. That I lived in?
Q. The one that is on the road at the present time?
A. It is at the gate of the Free Masons' Cemetery.
Q. In the Masonic Cemetery?
A. Yes, sir; I sold that time.
Q. That is the one you lived in?
A. Yes, sir.
Q. The cemetery is located on the claim you had?
A. Yes, sir.
Q. Did your claim conflict with the Belvidere ranch?
A. No, sir; Meyer's claim was between it.
Q. What did you mean by saying that there was some fencing laid there?
A. Well, the teamster didn't know where the place was, and he had to go in town to find out. I was not there at the same time.
Q. Donahue's teamster didn't know where to leave the lumber, and left it on your place?
A. Left in on my place, and the next day hauled it away again.
Q. You know the present fences, do you?
A. Yes, sir.
Q. When were they built?
A. In 1861.
209 Q. By whom?
A. Well, I was told it belonged to Donahue and Evans; and Markgraff put up the fence.
Q. The same man who was examined as a witness?
A. He was living the same time on my place.
Q. What became of the fence?
A. Well, they were put up on the ground.
Q. Are they there still?
A. Yes, sir.
Q. Now, before that fence was built, was there any fences built on the premises corresponding to those fences?
Mr. SHARP. Well, I believe I have asked him all about it. He said there were no improvements. That is all.

Cross-examination:

By Mr. HOLLADAY. Did you know Evans?
A. Yes, sir.
Q. What countryman was he?
A. He was an Irishman.
Q. What was his first name?
A. John.
Q. When did you first know him out there?
A. I knowed Evans out there about 1853—about 1855; not on that tract of land.
Q. Where was he?
A. He was then on the Sproul tract; at the present time, Mr. Schaadt's tract.

Q. Which way is that from the Belvidere ranch?
210 A. South of it.
Q. You afterward knew Evans on the Belvidere ranch?
A. Yes, sir.
Q. When?
A. About 1857.
Q. What house did he live in?
A. He lived in the house what Flieschacker had.
Q. Who was he claiming under, Dr. Gautier?
A. Yes, sir.
Q. Was it called the Belvidere ranch then?
A. Yes, sir; I never heard no other name for it.
Q. What ranch was north of the Belvidere ranch then?
A. Well, at the present time, Sullivan and Cashman.
Q. What ranch was to the east of it?
A. Meyer's.
Q. S. T. Meyer's ranch?
A. Siegmund.
Q. What ranch was to the south of it, Schaadt?
A. Yes, sir.
Q. What was it to the west of the Belvidere ranch?
A. Byefield.
Q. Not south, but straight west going towards the Pacific Ocean.
A. I believe Sproul bought that; I don't remember; I don't know who it belonged to.
211 Q. How much did the Belvidere ranch then consist of; how many acres?
A. I don't know.
Q. You have no idea?
A. No; I don't know about that.
Q. You say there were eight or ten acres, I believe your estimate is, fenced in around the Fleischacker house?
A. Yes, sir.
Q. What was the fence along the Cashman and Sullivan line; the north side of the Belvidere ranch?
A. There was posts and rails partly, partly brush; cattle tore it down sometimes.
Q. What fence was on the east line of the Belvidere ranch next to Meyer's tract?
A. Meyer's tract, there was none; I don't remember any fence there.
Q. Between Meyer's and Fleishacker's?
A. There was only a small wire-fence around where they raised barley, next to Fleishacker's posts and wires.
Q. What was south of the Belvidere, between that and the Byfield and Schaadt?
A. None at that time.
Q. Was there no line between Fleishacker and Schaadt?
A. There was a little fence around, part way, not much; there was a gate open, cattle——
Q. (Interrupting.) Do you remember a brush fence between Byfield and Schaadt and the Belvidere?
212 A. I don't remember.
Q. Did you know the line between the Belvidere and the ranches on the south of it?
A. No, sir.
Q. Didn't know where it was?

A. No, sir; there was no lines.
Q. Did you know Peter Schaadt?
A. Yes, sir.
Q. How long ago?
A. About ten or twelve years.
Q. Where was he living then?
A. He was living there, where he is now; where Evans was before.
Q. Is that on the Belvidere ranch?
A. No, sir.
Q. Where is it, south or north?
A. South.
Q. How much land was Schaadt claiming there as his claim?
A. I don't remember; he bought it from Sproul.
Q. Do you not know how much he claimed there?
A. No, sir.
Q. You knew Samuel Fleishacker, did you?
A. Yes, sir.
Q. How long did he live there?
A. About a year and a half, I think; about a year or two years.
Q. You don't remember particularly?
A. No, sir.
Q. Had he any family there?
213 A. Yes, sir.
Q. Wife and children?
A. Yes.
Q. Any servants?
A. There was a Spaniard there sometimes, cutting wood and burning charcoal.
Q. How far was that from the house?
A. Well, he burned it on my ranch and everywhere else, and paid me ten dollars a month, and dug stumps; and sometimes took it somewhere else.
Q. Who paid you, Fleishacker?
A. No; the Spaniard.
Q. Was the Spaniard to work for Fleishacker?
A. No, sir; he was living on the Byfield tract, and worked sometimes here and sometimes there.
Q. I asked you if Fleishacker had servants and you said he had the Spaniard.
A. The Spaniard who staid there a short time.
Q. What year was that?
A. Well, in 1854, I think.
Q. What stock did Fleishacker have there ever, while he lived there?
A. Well, a couple of horses; he had a mule and wagon.
Q. Do you remember his having a large flock of fat hogs once?
A. There was hogs there; yes, sir.
Q. Of his?
A. I could not tel you; there was hogs running around there belong' to Fleishacker's place.
214 Q. How many?
A. Well, a couple of dozen.
Mr. SHARP. Were those hogs running at large, or were they confined in any enclosure?
A. Well, they was not confined in no enclosure; there was a kind of pen; the breeding-sows was in a pen.

Mr. HOLLADAY. Whose land was on the west when Fleishacker was there?

A. I don't remember; I don't know who it belonged to; there was too much land there; you could take it any way.

Q. You were directly west of Fleishacker's claim?

A. To the east.

Q. I don't mean when you were on the Sans Souci, but when you were on Lone Mountain, where the Masonic cemetery is; now which way from the Fleishacker or Belvidere ranch?

A. East of it, or southeast of it, I believe.

Q. Do you know how many acres Fleishacker claimed to own at that time?

A. No, sir.

Q. Do you know whether there was—you say that at that time when Fleishacker was there the land on the north of him was what is now called the Sullivan, Buckley and Cashman tract?

A. Well, it was; the Frenchman had it; it was fenced in there; he had a fence there on his tract.

Q. On the north line?

A. Crotchet.

215 Q. That was before Buckley, Sullivan and Cashman claimed it; Crotchet claimed it then?

A. Yes, sir.

Q. What was north of the Fleishacker or Belvidere ranch? There was a fence there then; Sproul was on the south, was he, at that time?

A. At that time.

Q. When Fleishacker was there he had no fence?

A. No; he had no fence.

Q. Meyers was on the east?

A. Yes.

Q. They had a fence?

A. A small piece; about three or four acres.

Q. I mean the line.

A. They had no line-fence.

Q. There was no fence between Fleishacker and Meyer?

A. No.

Q. Are you clear about that? Other witnesses say there was.

A. I am clear; only the lower part where they were plowing—a small tract of land.

Q. Did you ever go up among the bushes to see if there was a fence further north?

A. I went around the brush many times, because I had to fence my place; because there was no fence between Meyer; that wire fence was taken away.

Q. What buildings have been put on the Belvidere ranch since Fleishacker lived there?

216 A. There is one house about in there—about Crotchet's place.

Q. Who put that up?

A. I don't know who put it up; Markgraff built a house for Donahue, I guess.

Q. That one house?

A. Yes, sir.

Q. Which way is that from the Fleishacker house?

A. It is to the north of it.

Q. Northwest would you make it from the Fleishacker house?

A. Yes, sir; northwest or north.

Q. Did you see Markgraff when he was fencing for Donahue?
A. Yes, sir.
Q. Did Evans help him?
A. I saw them both there.
Q. You saw Evans there too?
A. Yes.
Q. Did you know George N. H. Davis and Israel E. Woolf?
A. No.
Q. Did you know Louis Cohen?
A. I heard of them.
Q. Did you know S. T. Mayer?
A. I saw the parties come out there, and Labatt.
Q. Did you know Labatt?
A. Yes, sir.
Q. Did you see Labatt on the premises ever?
217 A. One time I saw him.
Q. When?
A. It must be about 1862.
Q. What was he doing?
A. He was fencing in. I thought he was coming a little too close on my line; there was no lines left.
Q. Did you ever see him there before that time?
A. Not I. I didn't before there. I have not seen him before there. I was not there all of the time. I was in the city all of the time.
Mr. SHARP. You take care of the city-hall; that is your occupation?
A. At that time; yes, sir.
Mr. HOLLADAY. Did you ever see Labatt on the Belvidere ranch more than once?
A. I never saw him there on the Belvidere ranch. I never saw him.
Q. I thought you said you saw him fence it?
A. My place, the Lone Mountain ranch.
Q. Labatt claimed your place when he was fencing there?
A. Yes, sir; for Meyer & Seligman; he wants to go across my land. I stopped it and fenced across his place.
Q. You never saw him on the Belvidere ranch?
A. No, sir.
Q. How long did Evans and his family continue on the Belvidere ranch?
218 A. About five years—five or six years.
Q. How many years were you in charge of the city-hall or board of supervisors, as janitor I believe it was?
A. About eleven years.
Q. During that time did you live out there on your ranch?
A. Yes, sir; I lived there three or four years.
Q. Did you go out nights and come in mornings?
A. Yes, sir.
Q. How much land is an acre? How big is it on each side?
A. Well, about near a block.
Q. A big block or a little block?
The COURT. You mean a hundred-vara survey, or a fifty-vara?
A. A hundred-vara survey.

Redirect examination:

By Mr. SHARP. What year did you see the hogs there?
A. 1853 or 1854. The first I see them I saw them in 1853 or '4. They was but a very short time there.

Q. In this enclosure you have spoken of—eight or ten acres—or running at large?

A. Running at large.

Q. Did you see any hogs there after 1854?

A. Yes, sir; I saw some hogs there, I believe, in 1865. I was not out there after that, much.

219 Q. From 1854 up to the time when Leopold built the fence for Donahue, were there any hogs out there?

A. Yes, sir. Evans got some.

Q. Whose hogs did you refer to as being there in 1853 and 1854—whose hogs were those?

A. I don't know.

Q. You say you never saw Labatt there in that neighborhood but once, and that was in 1862?

A. That was on my ground.

Q. He was trying to squat on your ground, was he?

Mr. HOLLADAY. He didn't say that.

The COURT. He says, "Close to my ground."

Mr. SHARP. What was he doing?

A. He had some carpenters out there making a fence. They were, just at that time, all fencing in. I met the carpenters, and I told him to stop—that I had to go across that road yet.

Q. Did you have a difficulty?

A. No.

Q. He was not trying to take your land?

A. No, sir; he never had no survey before. Mr. Short came there afterwards and made my map, and made his map afterwards.

Q. The premises he was having fenced then—was that any portion of this Belvidere ranch?

A. No, sir.

Recross-examination:

By Mr. HOLLADAY. What land was it?

A. Between me and Meyer or Seligman.

220 Q. What was he doing for Meyer?

A. I believe he was agent.

Q. May not you be mistaken, and his fence have reference to the Belvidere ranch?

A. No; the Belvidere ranch didn't come up so high; it didn't take it between us.

(Witness explains on the map.)

Q. Where was Labatt fencing at that time?

A. It was on the east side of Meyer's fence.

Mr. HOLLADAY. Say, "Not on the Belvidere ranch;" that is the shortest way.

Mr. SHARP. Where did Evans move when he left the Fleishacker house?

A. He moved up to the place I have just spoken about.

Q. That Labatt had?

A. Yes; that he claimed then.

Q. About how far was that from the Fleishacker house?

A. Well, about a half a mile; close to my fence.

Q. Did Labatt claim that place Evans moved to?

A. Well, it was from Labatt and Evans.

Mr. HOLLADAY. Donahue never claimed that; did he?

A. No, sir.

Mr. SHARP. Was there a house on that piece?

A. Evans built one there.

Q. Did he live there afterwards?

A. Yes, sir.

Q. With his family?

221 A. With his family; he died there.

Q. Did Evans go back to the Fleishacker house afterwards to live? Never mind, that is immaterial.

Mr. HOLLADAY. Do you know of any brick-work in either of those houses, the Fleishacker or the other, built by Markgraff?

A. Well, Fleishacker house has a brick chimney.

Q. Is there any in the other?

A. I don't remember.

Q. When was that brick chimney built in the Fleishacker house? It is the old fire-place that has always been there?

A. Yes; and broke down several times.

Q. In the Fleishacker house?

A. Yes, sir.

Q. It has been repaired?

A. Yes, sir; he was a bricklayer, Evans was. He repaired it several times.

Mr. SHARP. Is there not a large fire-place and brick chimney in the other house, where Leopold lived?

A. I was not in that house, now, since about ten years.

WILLETT CULVER, called for the defence, sworn, examined:

By Mr. SHARP. Do you know what is called the Belvidere ranch, or the Donahue tract?

A. I know a tract that is called the Donahue tract and Fleishacker's tract.

222 Q. Have you ever resided in that neighborhood?

A. Yes, sir.

Q. When did you go out there to live?

A. The first of January, 1855; the 11th day January, 1855; I was out there a little before, but I date from my own record.

Q. What place did you go to reside? How far from this Fleishacker house?

A. About half a mile from where I lived; I never moved from the time I went there.

Q. That is your present residence?

A. Yes, sir; I have lived there ever since; I never moved.

Q. You have lived there continuously since the eleventh of January, 1855?

A. Yes, sir.

Q. Did you have occasion to pass the Fleishacker house or tract often?

A. I live about a half a mile this side.

Q. Can you see that tract from your house?

A. No, sir; it is right over the hill, in the hollow, the other side.

Q. What improvements were on that tract when you first observed it in 1855?

A. Well, there is a little valley of about ten or twelve acres of ground, that Fleishacker claimed, that had a brush fence around it, and improved; he lived in the house.

Q. The house inside of this enclosure?

A. Yes, sir; he built a house on that inside of this land; it
223 was a small valley there, and the other part is not fit for cultivation; it is a very pretty little valley, about ten or twelve acres, I should think at a rough guess.

Q. In 1855, was there any other enclosure?

A. I didn't see any.

Q. How was it in 1856?

A. I didn't see any.

Q. How was it in 1857? If there had been any you would have seen it?

A. I suppose there is no man who has traveled over that land so much as I have myself, every day in my life, after my cattle and my mules; probably there is no man here that has traveled over it so much.

Q. You have been over it every day?

A. Every day.

Q. Had there been any other enclosure in 1855 and 1856, you would have been apt to have seen it?

A. My eye-sight was pretty good then; I think I should have been most likely to have seen most all of the improvements on the outside lands; I didn't see much anyways down to 1860; I didn't see much of any one down to 1860; I am asked about fences, and I say I saw some few shanties—small tracts of land that persons claimed; I never knew where their boundaries were.

Q. How was it in 1857?

A. Mr. Fleishacker——

Q. (Interrupting.) In what way do you know when he left there?

224 A. He left in the latter part, as near as I can recollect; I may be mistaken, but I think, as near as I can recollect, he left in the latter part of 1855; perhaps it might have been some time in 1856, but it was near as I can recollect; I may be mistaken, but that is about as near as I can recollect; he was living there in 1855, I know, because I talked with him very often when I was out there after my stock.

Q. I guess you are correct according to the record.

A. That is as near as I can recollect.

Q. Were there any additions or extensions to this enclosure made in 1857; if so, by whom?

A. After Fleishacker left that house that stood inside of the enclosure of that ten or twelve acres that I speak of, the first person I knew that occupied that house was John Evans, who is now dead.

Q. What year was that?

A. It is very hard now to tell; it was only a short time after; it might have been a year; it *it* was a short time after; he was the first person that occupied the house after Fleishacker left the house; he then went in to make improvements——

Q. What year; in 1857?

A. Very likely; quite probably; I think somewhere about that time;
I might be mistaken; I had no occasion, you understand, to
225 make any record, because I didn't want to know anything about it.

Q. What did Evans do, if anything?

A. After Evans had been there—well, he cultivated that piece I speak of, and made an extension of it, improving to the south of where this house now stands, in a little valley there was there, right over the hill. He made that, and put a brush fence about it; that was the first thing that was done after that.

Q. About how many acres?

A. Well, that might be three or four acres; that is south, you understand, of the piece I speak of.

Q. Now, in 1858 was there anything done?

A. I don't think there was much done there until pretty near 1860, after the decision of the supreme court on the Peter Smith's judgments. I don't think anything was done much in outside lands except a few fields, small patches that I might name before this court.

Q. Do you remember of any fencing that was done there in 1861; was it in 1860 or 1861 that you referred to—the time of these fences?

A. There was fencing being made by John Evans, who is now dead.

Q. Who assisted him?

A. I think Markgraff was his assistant, and they said they
226 were making it for Donahue. I think he said it was for Donahue, as near as I can recollect.

Q. This gentleman over here? (Referring to defendant Peter Donahue.)

A. I don't know him; he told me he was making it for Donahue, and Markgraff was helping him at a pinch. That is all I know about it.

Q. He was making it for who?

A. Donahue; he told me so; that's all I know about it.

Q. What kind of a fence was it?

A. A board fence.

Q. Do you know the present fences?

A. Yes, sir; I think the same fence stands there now.

Q. You think it is the same fence he built then?

A. I think it is. I think up to that time. I might be mistaken; I had no particular dates, but it makes pretty near that time.

Cross-examination:

By Mr. HOLLADAY. What fencing was done in the Fleishacker tract

A. Well, all he said was he told me that he was fencing for Donahue; that is all I knew. I paid no attention to it.

Q. You saw them at it?

A. Yes, sir; I saw the lumber there. I was after my cattle, and seeing the lumber there called my attention to it, because it was in
227 the way; and it rather took my bread and butter off me, because I could not get my cattle across there.

Q. It interferes with the usual trails?

A. Yes, sir; they didn't interfere much with the trails, because they left a gap around so that the cattle could get through. It did interfere with the trail out there at Spring Valley.

Q. They had left a gap?

A. Yes, sir; in every one of those fences they left holes so that you could get through. I never seen any place but they could get through.

Q. Mr. Fleishacker was living there, you say, a while after you went there, in January, 1855?

A. As near as I can recollect; I believe most of that year he was living there.

Q. Was anybody else living there at that time about Fleishacker's tract? What settlements were there about there?

A. There was what they called the Meyer claim, this side of the boundaries, owned by Seligman; on the claim called the Meyer claim at that time, there was a small shanty there.

Q. That is on the east of the Fleishacker tract?

A. That is on the east of the Fleishacker tract.

Q. Then the Meyer tract, as you understood it, was the boundary of the Fleishacker trac

A. Yes, sir; so they said that that brush fence there they said was the east boundary; that is, they told me so; that is all I know; they told me so; that is that brush fence there where I used to get blackberries.

228 Q. There were blackberries there then?

A. Oh, lots of blackberries there.

Q. Was there anybody else that lives around Fleishacker's house?

A. I could name everybody that was with me on the outside lands there, if necessary.

Q. I want you to name who was living around there when Fleishacker was there. Who lived there south of Fleishacker's?

A. Well, Mr. Sproul was living in the house that is now claimed by Peter Schaadt, at that time; that is south; half a mile south where that house stands now, probably.

Q. Mr. Sproul was claiming a tract of land there, was he?

A. Yes, sir.

Q. His house was about a half a mile south of Fleishacker's?

A. I think about a half a mile; of course I can only guess; I think that is pretty near; on Sproul and Fleishacker's land, bounded each other. Really I never seen any boundaries with either one at that time.

Q. Well; as they claimed?

A. They claimed it, but I never knew where they had any fence; but it was a pretty big field at that time; there was no fence between, you know, but they claimed it, of course.

Q. I didn't ask you that; I ask you who was living west of Fleishacker.

229 A. Well, there was a man by the name of Sweeney, during the year 1855, that lives inside of a tract called the Byfield tract, which had the only fences there were outside, pretty much.

Q. If you will please to answer my question, and not run wild, we will get through quicker, and it will be more satisfactory to me. Sweeney was living to the west of Fleishacker house, or what is called the Byfield tract, you say?

A. Yes, sir; what is called the Byfield tract, inside of that inclosure.

Q. Inside of the Byfield inclosure?

A. Well, it was enclosed in a certain way.

Q. Who was living on the north side of the Fleishacker tract?

A. You will have to go over into the Odd Fellows' Cemetery and take my answer to that. I will tell you, there was nobody living there on the north until you got over to the Odd Fellows' Cemetery. That was claimed by an Englishman; I forget his name; he had a little house there. The Odd Fellows' Cemetery, there.

Q. That little house in the centre of what is called the Sullivan, Buckley, and Cashman tract?

A. Yes, sir; in where they pretend to claim. I never inquired who claimed it; but that was the nearest house south at that time. It is nearly south of what they say or call their claim on this tract.

Q. Within what has since been known as the Byfield and Sullivan tract?

A. Well, it is north of Fleishacker's.

230 Q. If that was the line of their fence between the Meyer and Fleishacker claims—was it the line?

A. It would be directly north; it would not come in contact there with the Killian's claim in the least.

Q. Did you ever visit Fleishacker's house whilst he was living there?

A. Yes, sir; my cattle used to run over there and get into his grounds; get into the little enclosure of brush-fence. He didn't seem to find any fault with it. I used to talk with him about it.

Q. He didn't make much fuss about it?

A. Oh, no; he didn't seem to care about it.

Q. Did you ever converse with Fleishacker?

A. Yes, sir.

Q. Did you ever hear him say what he claimed?

A. I was never in his house but twice; I have often conversed with him, and after he moved away I have oftentimes seen him.

Q. You never heard him say about that?

A. I never heard him say much about it. I never was in his house but twice.

Q. Schaadt's claim was not fenced?

A. Schaadt had his claim where it is now, in Jesus Noe's claim. There was a fence, but there was no fence outside of that where it is claimed now to be; that claim there was no fence at all on. I am telling you about where the board-fence runs along between the good and poor land there. The poor land was not worth anything. Nobody cared for it at that time.

231 Q. Do you profess to know all of the brush-fences that were there when you were traveling around fifteen years ago?

A. Yes; I have lived there eighteen years, and I know all about it. I expect I could beat most all of them if I had a mind to.

Q. Do you remember of all of the brush-fences that were there then?

A. I know a good many. I know that my mule used to run out almost to the Ocean House. I remember a good many little small patches around in there, in little hollows, where they could just cultivate a little piece, and they would have a small shanty on it. But the most of these houses had nobody in them.

Q. Did you use to dine at Fleishacker's house sometimes?

A. I never was in the house but twice; they were strangers to me.

The COURT. The question is, did you ever dine there?

A. No, sir; I never dined there; I never was in the house but twice; that is, during that year, you know; I have been there a good many times when Evans lived there.

Q. Did you know Dr. Gautier?

A. I did not.

Q. Did you ever hear Mr. Evans say who he was claiming under?

A. Who? Evans? All he ever told me was he was keeping
232 possession for Donahue; that is all I know or heard; I never heard of the others until within the last few years.

Q. How early did you know of Evans there?

A. Well, he was the first one that moved there after Fleishacker went a way

Q. That you are clear of?

A. Yes, sir; because I went there every day.

Q. You are positive that Evans was the first one that was there after Fleishacker went away?

A. That is the first that ever I saw there after Fleishacker went away.

WILLETT CULVER recalled for further cross-examination:

By Mr. HOLLADAY. State again, Mr. Culver, whom you saw in possession of this Fleishacker tract, first, after Mr. Fleishacker left.

A. I say, as I said before, and repeat it again to you, John Evans.
Q. That was when?
A. I think the house stood empty but a short time; but I cannot fix no date, but it was—you know I might be several months out of the way.
Q. After Fleishacker left the house it stood empty several months, and the next you saw was Evans living there?
A. I saw nobody living there. There might be a man there asleep, but I saw nobody there till I saw Evans there.
Q. I say he was the next you saw there?
A. Yes, sir.
233 Q. Fix the year when you first saw Evans there.
A. I am inclined to think, it appears to me, it must be 1857; somewhere along there; I might be a year out of the way; I had no occasion to recollect the date.
Q. You saw Evans there?
A. He was the first man I saw there. I did not see anybody else there till I saw Evans there.
Q. We have got that out twenty times at least, that the first man after Fleishacker that you saw there was Evans?
A. Yes, sir.
Q. You cannot remember the year?
A. It appears to me it was 1856 or '7; it appears to me so. I may be mistaken; that is as near as I can recollect.
Q. How soon after you first saw Evans there did you have a conversation with him?
A. Oh, I think I might have within one or two days. My cattle was running every day around the house for years.
Q. The first time you saw him?
A. I don't think he had been there more than a day or two before I saw him, because my cattle were running around the house to get grass.
Q. I didn't ask you anything about grass——
A. (Interrupting.) I want to give the reasons, that is all; that would be more satisfactory.
Q. You conversed with him after you saw him?
A. Yes, sir; very soon.
234 Q. And he told you he was a tenant of some one?
A. Not on the first occasion that I saw him; I had no occasion to see him about it.
Q. How soon after he was there was it?
A. Some time during the year.
Q. During that first year?
A. During that first year.
Q. Under whom did he say he was holding?
A. He told me he was holding for Mr. Donahue.
Q. That is the first?
A. That is the first I had.
Q. Now, is your recollection pretty clear about that?
A. I don't think there is any man in the world that can recollect everything that is referred to with no *education* to think about it; in other words, I don't think I could.
Q. In other words, you do not remember.
A. Remember what?
Q. Where it was.

A. Ask me that again, so that I can answer you clearly, because I think I know as much about it as anybody.

Q. What year was it, that is the question, that Evans first told you he was holding for Peter Donahue?

A. I cannot answer that question.

Q. You cannot tell what year?

235 A. No, sir; I might be mistaken a year or two; I cannot tell, because I had no occasion to recollect anything of the kind.

Q. All right; stop; you have said you cannot; I take it for granted that is so. How soon was it he told you this after you first saw him?

A. I just answered that question before.

Q. Please answer it again.

A. I told you I might be mistaken a year or two; because I had no occasion, you understand, to remember anything about it.

Q. Didn't you say just now you saw him there immediately after he went there?

A. Yes.

Q. And immediately after he went there he told you he was holding the land for somebody else?

A. Well, that might have been 1856, 1857, or 1858.

Q. One of those years he told you that?

A. Yes, sir.

Q. You are positive of that?

A. I think I cannot be mistaken, for the fence was built after 1860, as I told you before, and he went and improved a little piece back of that house.

Q. You are just as clear about that as about all other facts you have stated?

A. Perhaps I am not clear about anything.

Q. I think you are not, myself. Do you remember having a conversation with Mr. Friedman, in front of your door, a year or two ago?

236 A. I recollect seeing Mr. Friedman, as I told you before, when he passed through the lane there; I can tell you the year if you want to know.

Q. Well, when was it?

A. When Brown jumped the ——— claim——

Q. (Interrupting.) I did not ask anything about that.

A. Well, you asked the question.

Q. I asked when was it.

A. In the year 1860, very soon after the decision of the supreme court on the Peter Smith judgment; very soon after that.

Q. You first knew Mr. Friedman in 1860?

A. The first time I ever saw the man in my life.

Q. In 1860 was the first time?

A. The first time I saw him to know him. I don't know a man that I am not acquainted with. I might see any one, and speak to him and not remember it. I might see a thousand out there.

Q. You remember him to know him since 1860?

A. I see him now and know him. I see him in town every day, but I never saw him out there in that country to know him, only that time that I tell you, when I met him in the lane there.

Q. Do you remember seeing Mr. Friedman in front of your house, and having a conversation with him in the year 1868?

A. I don't know. I might have met a thousand and not know them. I saw so many people at the time I was making my fence there in

237 1868 that I might see a thousand and not know them to-day.

Q. Do you remember of any such conversation at that time?

A. I don't know; there might have been such a conversation; I don't know anything about that; there were so many people there at the time the fence was made, I might have known him and met him there; I can't tell.

Q. Did you ever converse with Mr. Friedman about the time this suit was commenced against Peter Donahue for the Fleishacker ranch, in front of your house?

A. I have no recollection of it; it might be, but I have no recollection.

Q. It might be, but you do not recollect?

A. I don't recollect, but it might be.

Q. Do you remember telling him you knew Fleishacker had a tract of one hundred and thirty-six acres, well fenced? Do you remember telling him that in front of your house?

A. I do not remember; it might be, but I do not remember it; it might possibly have been, but I do not remember.

Q. Do you remember telling Mr. Friedman that you had dined with Fleishacker often on this ranch?

A. I never told him that. I never did tell him I had dined with Fleishacker. I repeat what I said before, if the court will hear it. I
238 never told him such a thing. I never was in the house but twice in my life. I never saw him but twice in my life——

Q. (Interrupting.) Did you ever converse with Mr. Jarboe, the attorney of Fleishacker, in regard to this tract?

A. I do not know; I did so much talking that goes into one ear and out at the other that I declare it is diffiult to place myself in any condition of the kind. I might have conversed with a thousand, there has been so much talking. I might have conversed with ten thousand.

Q. Your answer is, then, that you might have conversed with Mr. Jarboe, and might not, but you do not remember it?

A. I do not remember. Mr. Jarboe might have conversed with me about it. I do not recollect it.

Q. Your answer is that if you ever conversed with Mr. Jarboe, the attorney of Aaron Fleishacker, about the Fleishacker ranch, you do not remember it?

A. I do not remember conversing with Mr. Jarboe; and I might. There have been so many lawyers talking about it to me that I do not know. I didn't want to recollect. I may have done it, but I cannot recollect it.

Q. Your mind gets confused?

A. No; I am not confused. I can recollect it all.

Q. You know where Mr. Jarboe's office is?

A. Yes; I wish he was here to hear my language now.

239 Q. Were you ever at his office?

A. Yes, sir; I have been to his office on business.

Q. Was the question of the Fleishacker claim ever broached when you were at his office?

A. I do not recollect, Mr. Holladay; I do not recollect that part. I might and might not. He might have asked me a hundred times about it. I don't recollect particularly, because I do not recollect about these ruffian claims outside.

Q. Well, you do not recollect whether it was or not?

A. I have answered it a half a dozen times, and I can answer it again. I do not recollect it. I might answer it a half a dozen times. I do not recollect.

Q. You wish the jury to understand that some time in the year 1856, 1857, or 1858 you saw John Evans in the Fleishacker house, where he was living, and he said then that he was on the land living there as tenant of Peter Donahue?

A. I did the first time. I can answer more distinct, for the court to understand. He is the first man that I saw in the house after Fleishacker went away. I think it was some time in 1855 or 1856. He is the first man I saw there, that is Evans, but I cannot fix the date. It would give me pleasure to do so if I could, but I have had no occasion to recollect that date.

Q. You fix the fact that he then said that he was holding under Peter Donahue?

240 A. Let me answer that, because I think you ought to understand me better, and it will give better satisfaction to you, because he might have lived there a year or two before that. I had no occasion to see the man. I was going in and out. My cattle were running everywhere there——

Q. (Interrupting.) I don't care about your cattle running; I am asking you about Evans—whether soon after you saw Evans there, he said to you that he was holding for Peter Donahue. Is that what you mean to say?

A. I mean to say so that the court will understand me; I asked Mr. Evans, when the fence was made, what that lumber was for—the lumber that they were taking out there for the fence in 1860—and I asked him for whom they were building the fence, and he said, "We are making it for Peter Donahue; fencing in my claim."

Q. With Markgraff; that is the time he said he was holding under Peter Donahue?

A. That is the time; he might never have said it before, but I do not remember about it; he was staying there.

Q. What is the time you refer to?

A. I am sure of that time, that he told me, and it might have been before, but I cannot be positive; I want you to understand that.

Q. It was when they were fencing?

A. Yes, sir; fencing.

Q. It was not immediately after you saw him there?

241 A. I cannot be positive as to that, Mr. Holladay; but I am positive of one thing, that when the lumber went there he told me then he was fencing that for Donahue.

Q. That you are clear of?

A. That I am clear of; the other part I am not.

Q. Did he say how long he had lived there?

A. (Continuing.) I presume he was not doing much for a year or two, but cultivate that piece of land there; and he made some improvements back in the rear.

Q. From 1855 up to the time those fences were built that you last spoke of, how were the fences in that neighborhood around those claims—were they all fenced up?

A. I say, as I said before——

Q. Say it again.

A. There were only a few places near the charter-line of 1851, down to the time of the decision of the supreme court against the city; those were only a few points, if you would like me to state——

Q. (Interrupting.) No, no; answer the question.

A. Well, it was an open, wild common.

Q. You refer to the case of Hart vs. Burnett?

A. Yes, sir; the first decision on the Peter Smith judgment, as I have spoken before.

Q. There were various well-known claims there, were there not?

A. I was told there was claims, and I have spoken of some of them.

242 Q. The neighbors respected each other's claims?

A. I only speak of those I saw. There were really some improvements. I only speak of those I saw, because I did not know who claimed it.

DANIEL GREEN, called for the defendants, sworn, examined.

By Mr. SHARP:

Do you know the Belvidere ranch—the tract of land so called?

A. I never knew it as the Belvidere ranch. It was only called the "Fleishacker."

Q. You knew it as the Fleishacker or Donahue ranch?

A. Or Donahue.

Q. When did you first know it?

A. About 1852 or 1853, as the Fleishacker ranch.

Q. Did you ever live in that neighborhood?

A. No, not near; within three miles of it.

Q. Further west?

A. I used to pass through it once or twice a month for several years—from 1850 up to 1860.

Q. What improvements were there in 1852 and 1853 on that ranch?

A. There was a house on it in 1853.

Q. Is that the one Mr. Fleishacker lived in?

A. Yes, sir, Fleishacker, and was a very good, comfortable house, and a good fence around the place; partly made of a ditch, and willows, and one thing and another.

Q. How much did the fence enclose?

243 A. Well, I always thought it fenced in about twelve acres of land. I never saw it surveyed.

Q. Was the house inside of the enclosure?

A. It stood inside—in the improvements.

Q. Was there any other enclosure?

A. I never saw any while Fleishacker was there.

Q. How was it in 1854?

A. It stood the same.

Q. In 1855?

A. The same.

Q. In 1856, and clear up to 1860?

A. It stood the same till 1857, I think. I don't know what part of the year, but that year a man named John Evans was working around and living there.

Q. What change did he make?

A. He began to make a little improvement—to enlarge the field a little.

Q. About how much?

A. I could not say; may be a couple, or three or four acres.

Q. Then in 1859 or 1860?

A. Well, it stood about that way till 1860 or 1861.

Q. In 1861?

A. After that I lost the run of the property; everybody went out there improving, and I never took note of any change.

No cross-examination.

244 Mr. Sharp offers and read in evidence a deed from Isaac E. Holmes to Emile Perrain, dated Oct. 1, 1860; acknowledged January 22d, 1861; recorded January 24th, 1861, purporting to convey three acres undivided in the DeBrot tract.

Also, a deed from Emile Perrain to Peter Donahue, dated February 7th, 1864; acknowledged February 27th, 1864; recorded the same day, for the same undivided interest, 3 acres in the DeBrot tract.

PETER DONAHUE, one of the defendants, sworn, examined:

By Mr. PATTERSON. Do you know Henry J. Labatt, a lawyer who practiced in this city?

A. I did know him when he was here.

Q. You have seen the paper which has been put in evidence, purporting to have been signed by you, dated May 23d, 1861, called an acknowledgment; state whether or not you ever delivered that paper to Labatt.

The COURT. Let him state what he did in regard to it.

Mr. PATTERSON. His testimoney has been read as to what he did do. I wish to confine myself now distinctly as to what Labatt has testified to.

The COURT. (After discussion.) I do not know but you will have to go over the ground again if the objection is insisted upon, because what the witness considers a delivery might not be such; you must get out the facts.

Mr. PATTERSON. Did you ever hand it to Henry J. Labatt?

245 Q. (After argument.) When you signed that paper, where and with whom did you leave it?

A. I left it with Labatt—Mr. Bixler, I mean.

Q. Afterwards did you take it from Bixler?

A. I never seen it, or heard of it for more than three years after; I don't know whether it was three or four; I left it with the lawyer to get another signed, and I was to have one.

Mr. HOLLADAY. (Interrupting.) I object to that.

The COURT. That has all been gone over.

The COURT. Did you ever hand it to Labatt?

A. No, sir; no.

Mr, PATTERSON. Did you authorize or request any one to hand it to Labatt?

A. No, sir; it was left by me, signed and left with Mr. Bixler to give in exchange for one which he had drawn up, and I saw it in writing there, and I went off.

Q. Your answer is that you did not yourself hand it to Labatt, nor did you authorize or direct any one to do so?

A. That is my answer.

Q. Except in exchange for another paper?

A. In exchange for another paper which was drawn up.

Q. When did you first know of it having been in possession of Labatt?

A. I never knew it was in the possession of any one at all, or any one else, until I was called upon in the street one day by a man, who asked me in the street if that was my signature——

246 The COURT. (Interrupting.) This has all been gone over.

Mr. HOLLADAY. That was Cornwall, I believe.

Mr. PATTERSON. When you took possession of the premises in controversy in this action, did you have any understanding or agreement that you were to hold the same for anybody besides yourself?

A. I had no conversation with anybody. I built them for myself; I bought the property.

Q. When you commenced erecting fences around the Belvidere ranch, or whatever it is called, did you have a conversation with any one as to whom these fences were erected for, for whose benefit?

A. No; with no person except myself——

Mr. PATTERSON. (Interrupting.) When you repaired or renovated the Fleishacker house, as it is called, did you have a conversation with anybody as to whom it was being done for?

A. No, sir.

Q. When you built the new house, did you have any such conversation?

A. I was building it for myself.

Q. When you repaired or built the barn, did you have any such conversation?

A. No, sir.

Q. Neither when you repaired or rebuilt the house, or the stable, or at any other time, did you have any such conversation?

A. No, sir.

247 Q. When you dug a well, or put up a windmill, did you have any such conversation?

Mr. HOLLADAY. I never knew of any such thing. There has been no proof about that.

Mr. PATTERSON. Did you dig a well and put up a windmill?

A. I dug a well, but I did not put up a windmill; that is, my men dug a well for me.

Mr. HOLLADAY. There has been no windmill there?

A. There has been since, it may be; there is a windmill right by the line-fence that was put up by the road company, on the Seligman tract, just at the line.

Mr. PATTERSON. Did any person or persons, in any manner, contribute towards erecting the fence around the Belvidere ranch?

A. None but me.

Q. Did anybody ever offer to contribute?

A. No, sir.

Q. Did anybody contribute, or offer to contribute, towards keeping that in order?

A. No, sir.

Mr. HOLLADAY. I object to the last two or three questions, and ask that they be stricken out.

The COURT. I am inclined to think that that is all negative testimony. I will grant the motion to strike out the last three questions and answers.

Mr. SHARP. We reserve an exception. (Exception No. 18.)

248 Mr. PATTERSON. You went in there, the testimony has disclosed, I believe, in 1861. Now, who paid taxes upon that property for the revenue of 1861 and 1862?

Mr. HOLLADAY. That is immaterial, and I object to it.

The COURT. I have already ruled it out.

Mr. PATTERSON. I wish to reserve the point. (Exception No. 19.)

The COURT. I think I ruled against both of you on that point.

Mr. PATTERSON. I propose to prove that Donahue paid taxes on that property from 1861 down to the commencement of this suit.

Mr. HOLLADAY. That I object to.

The COURT. The objection is sustained; note an exception. (Exception No. 20.)

Cross-examination:

By Mr. HOLLADAY. Your first purchase of this ranch, your first interest in it, was from whom?

A. My first interest?

Q. Yes.

A. I bought the ranch from Dr. Gautier, and——

Q. (Interrupting.) Of whom did you make the first purchase?

The COURT. "And" what?

A. Through a broker.

Mr. HOLLADAY. Mr. Duprez?

A. Through a broker; yes, sir.

Q. That is the time you conversed with Casserly about it?

A. That is the time that Casserly and Bixler had a search made.

249 Q. Before you completed the purchase?

A. Before I completed the purchase.

Q. Do you remember the date of that purchase?

A. I do not remember the date exactly; it was some time in 1861.

Q. Who was Duprez the broker for—yourself or Dr. Gautier?

A. He was broker for Dr. Gautier.

Q. Not your broker, then?

A. No, sir; not at all; he was trying to sell the property for Gautier.

Q. Do you remember the price you paid Gautier for that land?

A. I don't, exactly; it was between four and five thousand dollars that I paid for it at that time.

Q. Did you pay the money to the broker?

A. I think Dr. Gautier was present; I paid it in Casserly's office and Bixler's.

Q. Is there not a balance of eighteen hundred dollars that you did not pay to Gautier?

A. No, sir; I paid all that I agreed to pay.

Q. Does not Dr. Gautier so claim?

A. He never claimed it of me; I paid the whole amount at the time; there was afterwards, I understood, some misunderstanding between Gautier and the broker—what is his name? Duprez.

Q. Is not there about eighteen hundred dollars more that you have got to pay on that purchase as soon as you get the title settled?

250 A. Not that I know of.

Q. There is no such dispute between you and Gautier?

A. Not that I am aware of.

Q. Do you know Madame Perrain?

A. I wouldn't know her if I saw her. I think I have seen her. I have seen her son. I think she is a French lady.

Q. This three acres you purchased of her, you remember that purchase?

A. I do not.

Q. Did you have an abstract made when you purchased that?

A. I forget; about that time I was very busy with the "Comanche." I had a great number of men to work, and it took all my time, and I generally left those things to Mr. Sharp, my attorney in the matter.

Q. Solomon A. Sharp?

A. Yes, sir; I think Mr. Sharp told me to purchase it—well, she came to me——

Q. Did she commence any suit against you?

A. Never, to my knowledge.

Q. Did she threaten to?

A. I forget. She was a poor woman that had some interest.

Q. Three acres?

A. Yes, sir; I think that is it. Her son or some young man represented her. Her son came once or twice.

Q. He brought it about? Do you remember how much you paid for those three acres?

251 A. I do not.

Q. The deed says three hundred and fifty dollars.

A. I guess that is right.

Q. Do you remember the date of that purchase?

A. I do not; I know it was long after I had the whole thing.

Q. The deed says it was September, 1864; that was after you made the first purchase?

A. Yes, sir; it was after.

Q. You remember that clearly?

A. That was after what?

Q. Your purchase from Gautier.

A. I am satisfied of that. I do not remember the date. There were several little conflicting claims after that.

Q. Do you remember where it falls, whether in the DeBrot tract or the Fleishacker tract in blue; or in what?

A. It was considered in the whole tract undivided. It was three acres somewhere, no one knows where; I don't know myself.

Q. You do not know in what part of the tract that three acres was?

A. No, sir.

Q. Did you ever purchase any other interest beside that of Madame Perrain in the tract?

A. I think I did.

Q. What other interests did you buy?

A. Rice—James Rice.

252 Q. James Rice, junior; did he commence suit for it?

A. I don't think he did.

Q. How did you happen to purchase the Rice interest? Did you seek him out or did he come to you?

A. He came to me with some claim of some kind.

Q. Do you remember whether the Rice purchase is in this Fleishacker claim?

A. I never knew any Fleishacker tract further than Fleishacker live in the old house called the Fleishacker house.

Q. Do you know what we speak of as the DeBrot tract?

A. No; I know it since it has been pointed out.

Q. On the map there which we have used; you know what we mean by the DeBrot tract, don't you?

A. I heard it pointed out here; I didn't know anything about the De Brot tract at that time.

Q. All you knew about it was that called the Fleishacker tract; is that it?

A. Yes, sir; and Hastings tract; Gautier and Hastings; I went out there and looked all around it.

Q. Before you purchased?

A. Yes, sir.

Q. Who was there?

A. Well, I went out with the broker.

Q. Was John Evans there?

253 A. John Evans was there.

Q. And his family?

A. His wife was there; he had no children.

Q. What countryman was John Evans?

A. I don't know; I think he was an Irishman, but if so he had been raised in this country, and you could not tell it by his accent; he had been a long time in America.

Q. I got the impression that he was a German or Welchman.

A. Well, he may have been, but I don't know; I thought he was an Irishman; I knew him a long time; I used to be out there myself very often and talk with him, and he used to come into my house; but he had been in Pennsylvania a long while before he came here, I think.

Q. I want to call your attention to a fact in regard to your former testimony. You said that you never received anything for this land; haven't you received money from Austin, the tax-collector?

Mr. PATTERSON. I object.

A. I gave a bond for the money which was lying dead; I ought to have got it, but Mr. Friedman prevented me.

Redirect examination:

Mr. S. A. SHARP. Between the years 1861 and 1868, during what time were you absent from this city?

A. I was absent twice.

Q. During what time?

254 A. Immediately after the finishing of the Comanche, at the close of the war, I was obliged to go to Washington to settle up with the Department; I was gone that time about nine months.

Q. Was not that in 1865—from February to November, 1865?

A. Yes, sir; that was about the time.

Q. What other time after that, up to 1868?

A. Well, then, again in 1869. The latter part of 1868 my daughter was sick, and had been sick a year——

(Interrupting.) That was in 1868?

A. Yes; my family was in Europe, and I went there and was gone twenty-two months, I believe.

Q. After 1868?

A. After 1868.

Q. Then you were only absent from the State once between 1865 and 1868; from February, 1865, to November, 1868?

A. I was twice to New York and once to Europe; I went to Washington immediately after the close of the war, about the Comanche.

Q. Before 1868, was it not on the 11th of July, 1868, that you went to Europe?

A. I forget the dates; Mr. O'Neil has got the books; he can tell; I do not remember.

Recross-examination:

By Mr. HOLLADAY. In your former testimony, in the first place, you said some $40,000 had been spent out there, and afterwards you

255 said $25,000 or $30,000; which do you mean to be understood as the correct answer as to the amount you spent there?

A. I reduced the amount to make sure; at your request, to be positive of it; not to overrate it; I do not remember myself just now.

Q. Have you looked up the accounts in the books to see?

A. I never have.

Q. Do you remember how many shares there were in that Central Turnpike Co.?

A. I do not.

Q. You stated you had two hundred shares, and paid assessments, and paid somebody else's assessments.

A. I subscribed two hundred shares, with a view to improving the property in the first place.

Q. You paid assessments on these two hundred shares?

A. I believe so; yes, sir.

Q. And you stated before that you paid for others, too?

A. Yes, sir; no particular individual; they had property-owners along the road, and they had made a contract like the board of directors, and the directors had made a contract to have this road built, and they failed to pay under the contract, and the contractors were required to come down on the directors; Mr. Seligman—I forget whether they really commenced suit against us or not, but Seligman, Brannan,
256 and myself, and there might be another person, but I think not; I think we took the——

Q. You shouldered the thing, I suppose?

A. Well, we had to pay the contractor.

SAMUEL H. NEWHALL, called for defendants, sworn and examined.

By Mr. SHARP. Will you explain to the jury there the different tracts represented upon the map? (Shows witness map, marked "Exhibit No. 10.")

Mr. HOLLADAY. What is the purpose of the testimony? I have objected to those deeds on the ground that they describe no land.

Mr. SHARP. I want him to go over the description in the deeds and see whether they are correct as delineated on the maps.

Q. Take first the first description there; what does it describe?

A. It describes the Fleishacker tract.

Q. Which one?

A. That colored yellow, or orange rather; this tract of $26\frac{45}{100}$ acres; it describes it as running down to the section-line, I think. (Reads description on map.)

Mr. HOLLADAY. That is the first description on the left-hand upper corner of defendants' Exhibit No. 10, the description of a parcel of $26\frac{45}{100}$ acres of the Fleishacker and Levy 160-acre tract, lying within the Donahue fences.

Mr. SHARP. (Reads second description in deed from Samuel to Aaron Fleishacker, dated October 6th, 1853.) Can you tell from that
257 description whether it is delineated upon that map?

A. I see nothing to correspond with it here.

Q. Did you assist in the actual survey by which that map was made?

A. No, sir; I did not.

Q. It purports to have been made by whom?

A. Mr. Humphreys, in 1866.

Q. Now, see if you can delineate this upon the map. (Reads description from deed of James Rice to Peter Donahue, dated October 31st, 1868.)

A. It does not lay down the starting-point. The north line is the same as the other description, the one in the first description—the $26\frac{45}{100}$ acres.

Q. It is an undivided $26\frac{45}{100}$ acres of the larger tract?

A. That description covers the $26\frac{45}{100}$ acres I read before.

Q. It would include that?

A. Yes, sir.

Q. Now, I read the description in the deed from John R. McConnell to James Rice, dated April 29th, 1865, acknowledged May 3d, 1865, and recorded March 12th, 1867. (Reads it.)

A. That description is the same as the second description in the deed Samuel to Aaron Fleishacker.

Mr. SHARP. Could you tell what land on the map there would be included by that description?

258 A. I see nothing at all I could identify any point by.

Q. Unless you know the beginning corner?

A. Unless I knew the beginning corner, or some other corner.

Q. Assuming for the present that that is the beginning corner, (showing,) what land would it cover?

A. This line, due east 60 chains, corresponds with the other description that I went over previous to this, and the next course also.

Mr. HOLLADAY. Those calls show a piece of land in that shape, but do not tell where it begins, or in what part of the city and county it is.

Mr. SHARP. Assuming the point of commencement down there, what land would it cover?

A. It would cover very nearly the same tract; it is one of those courses described in the previous description; I think, from what I recollect of the other description, that the two very nearly agree, excepting that the point of starting is not the same.

Mr. SHARP. You mean the description that commences a certain distance from section 7, township 2 south, range —?

A. No, sir; the point of starting is not the same; but if you will read it over you will see that the description in one agrees with the other.

Q. I think I understand you, Mr. Newhall. I see in these de-

259 scriptions that several of the calls in all three deeds agree. (Reads one of the descriptions.)

A. That description, I think, will just exactly correspond with this, except the point of beginning.

Q. Assuming the point of beginning, as fixed in that deed, to be such a distance from the township-stake there, would those descriptions in all three deeds cover the same land?

A. Assuming the point of beginning—well, the point of beginning is not the same in each; assuming this point of beginning here to be as described down here, (showing,) it would cover the same thing. The courses and distances in the two tracts correspond.

Q. Assuming the point of beginning in this deed to be the same as those deeds?

A. The description is the same; only the point of beginning is different; it starts from different points; it might be the same tract. I cannot state, but it corresponds very similar.

Q. I will get you to compare it with the foreclosure proceedings by Woolf and Davis, the second description in the deed from Fleishacker to Fleishacker, with the second description in the foreclosure proceedings, the description in the mortgage, and the decree of foreclosure, (reads from the description in the decree;) does that accord with the description you find in that deed of McConnell to Rice?

A. Yes; the same thing.

260 Q. Then the description in the mortgage and the decree of foreclosure of Woolf and Davis against Fleishacker, and the deed from Samuel to Aaron Fleishacker, the second description in that deed, and the description in the deed from McConnell to Rice, are all the same?

A. Yes, sir.

Cross-examination:

Mr. HOLLADAY. Referring to the last description, can you or any other surveyor, unaided, tell what land is therein described and locate it on the ground?

A. From that alone?
Q. Yes.
A. No, sir; not without some other aid than that.
Q. Is there anything in that deed that would aid you in telling where it is—the deed from Fleischaker to Fleishacker?
A. Well, as regards that, by taking the two deeds together, you might find that one point.
Q. No; from that deed alone, can you tell from that deed where that land is and locate it?
A. No, sir; there is nothing there—any definite point.
Q. Nothing in the deed showing any beginning or end whereby you could locate it?
A. No, sir.

WILLIAM P. HUMPHREYS, called for the defendant, sworn, examined.

By Mr. S. A. SHARP. Did you make that diagram? (Defendants' Exhibit No. 10.)
261 A. It was made under my supervision, sir.
Q. Was it made from actual surveys?
A. Yes, sir.
Q. Do you know the starting-point of what is called the Fleishacker and Levy 160-acre tract?
A. It has been some time since I have looked into this matter. You would have to refresh my memory somewhat to discriminate between the different parties here. (Refers to a memorandum-book.)
Q. I will read you the description from the foreclosure proceedings.
Mr. SHARP. The description is the same. I have here the diagram taken from the miscellaneous records. (Shows diagram to the witness.)
A. I recognize the shape of the claim as surveyed by me; it was so delineated. A portion of it is contained in the Donahue tract on this map. It is a matter I have not thought of for several years, and I have to refresh my memory.
Q. Look at the smaller diagram on the abstract, and courses and distances laid down on the diagram.
A. The courses and distances are laid down on this diagram.
Q. (Reads description to the witness.) Does that accord with what is described on the diagram?
A. That accords with this diagram.
Mr. HOLLADAY. He is now speaking of a diagram which the counsel presents to him.
262 Mr. SHARP: I merely want to show the shape of the claim.
Q. Would that, from the courses and distances, be about the shape of the claim?
A. It would, sir, about; I haven't measured it to the exact link.
Mr. SHARP. Is any portion of that delineated on the large map? (No. 10.)
A. There is.
Q. Just point out that to the jury.
A. This portion (showing) would represent a part of that tract.
Q. How were you able to locate that land upon the ground?
A. That is a matter now that will require some consideration. As I said before, I have not examined or thought of this matter for a long time, but it was one I know that required a great deal of trouble in looking into at the time; to the best of my recollection it was accord-

ing to the Pell meridian claimed by the surveyors—made from the Pell meridian.

Q. About when did you first make an actual survey of those claims out there?

A. These claims? 1865 or 1866; the date says 1866.

Q. Have you your field-notes?

A. I merely have a sketch in my book here, (shows.) It was in 1866.

Q. Did you have anybody to point out any corners or boundaries; if so, who?

263 Mr. S. A. SHARP. How would you locate it from the Pell meridian?

Mr. HOLLADAY. Do you withdraw the former question?

Mr. SHARP. No; I want an answer.

A. I don't recollect.

Q. How would you locate it from the Pell meridian you refer to?

A. Simply in connection with the continuous number of claims.

Q. Adjacent claims?

A. Yes, sir.

Q. Do you remember whether you located that claim from the Pell meridian?

A. I am not positive. To the best of my recollection, yes.

Q. You have surveyed all the outside claims, haven't you, outside the charter-line?

A. I have surveyed a great many.

Q. And inside of the city and county?

A. Yes, sir.

Q. I believe you made what is called the great map—the large map?

A. Mr. Potter and myself made the survey of the outside lands.

Q. Does that include all of the claims outside of the city or charter line of 1851, and inside of what is supposed to be the Pueblo?

A. The outside-land map?

Q. Yes.

264 A. It embraces all the territory, but does not include all the claims. They were not all located on it.

Q. In other words, they did not apply or pay for them?

A. A number did not apply, and some, after they had applied, did not have them located.

Mr. HOLLADAY. They were shingled over too thick, I suppose?

Mr. SHARP. Some had the surveys made and didn't pay for them.

A. That is the case with some.

Mr. HOLLADAY. They didn't get on, I suppose?

A. Some of them did.

Mr. SHARP. From actual survey you located that tract?

A. From actual survey I located that tract, or the northern tract.

Q. Fleishacker and Levy?

A. The one described in the diagram, or the northerly portion of that, here in the diagram.

Cross-examination:

By Mr. HOLLADAY. This survey you say you made in 1866?

A. In 1866; yes, sir.

Q. For whom?

A. To the best of my recollection, Mr. Donahue.

Q. Was that the first survey you ever made of that tract?

A. That particular tract?

Q. Yes.

265 A. To the best of my recollection, yes, sir.

Q. I am referring to the Levy and Fleishacker survey.

A. I am referring to the one hundred and sixty acres described on this diagram.

Q. Was that inside or outside of the Donahue claim?

A. The northerly portion?

Q. Yes?

A. A portion of it was within the Donahue tract, just north of the southeasterly fence of the Donahue tract, as indicated upon this diagram.

Q. Who pointed out the corners to you?

A. I don't know if any one; I have no recollection.

Q. Taking a survey made out in that vicinity, 1852, with that description, (reads the second description in the deed from Fleishacker to Fleishacker,) could you from that description locate that parcel of land?

A. From that description alone, without other knowledge, I could not.

Q. Did you find, when you made this survey for Donahue—did you find a stake and stone mound corresponding to this as given?

A. Not to my recollection.

Q. "Thence south so many degrees west, to a stake and pile of stones;" did you find that?

A. I did not run that portion of it; I run simply a portion on the north.

Q. Did you look for such a corner?

A. No; I did not.

266 Q. "Then north 78 chains 12 links, to a stake set for its northwest corner;" did you find any such stake?

A. No, sir.

Q. Thence, according to this description, to the northeast corner; did you find such a stake as mentioned in this description?

A. Not to my recollection.

Q. Thence, according to the description, according to the southeast corner; did you find that?

A. I was not there.

Q. Thence north, according to the description, to the place of beginning; you found none of those calls when you made the survey for Donahue?

A. I found none of those calls on that portion of the tract which I surveyed, to the best of my recollection.

Redirect examination:

By Mr. SHARP. As delineated there, about how much of that tract is within the Donahue fences or premises described in the complaint; it is marked there $26\frac{45}{100}$ acres; is that correct?

A. To the best of my knowledge, I believe it is, sir.

Q. Now, I will ask you about how much would be in this corner of the blue; this. (Refers to Exhibit No. 10.)

A. I can tell approximately.

Q. About how much?

267 A. About six or seven acres, I should judge; yes, about that, I should judge; well, this would be about nine acres, taking from $\frac{1}{4}$ to $\frac{1}{3}$—about 7 to 9 acres.

Q. Then I ask you if it wouldn't place from 7 to 9 acres of the Fleishacker and Levy tract in this—what is called the Fleishacker 80-acre tract?

Mr. HOLLADAY. I object to that, as he shows he does not and can-

not locate the Fleishacker and Levy tract, nor any one monument, and does not pretend to; we supposed that if there was ever any such tract, it was still further south of that.

The COURT. What is the question?

Mr. SHARP. The question is about how much of the Samuel Fleishacker and Levy survey would be within the Samuel Fleishacker survey of 80-acres, and within the premises described in the complaint as designated on that diagram.

Mr. HOLLADAY. I have explicitly called the attention of the witness to the calls in that deed, and the landmarks.

The COURT. Have you got the courses and distances there, and a scale so that you can ascertain?

A. I should judge from 7 to 9 acres, or thereabouts.

Recross-examination:

By Mr. HOLLADAY. Do you know where the Fleishacker and
268 Levy survey is upon the ground; could you locate it upon the ground to-day—the Samuel Fleishacker or the 80-acre tract?

A. I can resurvey it and relocate it, as having been made previously by me.

Q. Here is the only survey we have to go by. (Reads the second description in the deed from Fleishacker to Fleishacker.) Can you locate that land anywhere in the world—"beginning at a stake and stone mound," etc.?

A. I could not locate the claim with that description alone. I must have some other information from other sources.

Q. That is the description contained in this deed, sir; that is all.

Mr. PATTERSON. If called upon to locate it, you could find data from which to make the location?

A. I could by hunting the data from which I made the survey.

Mr. HOLLADAY. I don't mean your survey, but Hoadley's, in 1852.

A. I believe I could find the data—a portion.

Q. You say you didn't find any monuments there?

A. No, sir; not to my recollection.

Mr. S. A. SHARP. We put in evidence now the act of Congress of March 8th, 1866.

Also, ordinance 800 of the board of supervisors.

Also, the act of the legislature confirming ordinance 800.

Mr. HOLLADAY. What is the purpose of these?

269 Mr. PATTERSON. To show title in ourselves.

Mr. HOLLADAY. Do you propose to connect yourselves by deed with the city?

Mr. PATTERSON. No, sir; we say the ordinance and acts of Congress and the legislature gave us title without a deed.

Mr. HOLLADAY. We object to this as irrelevant, incompetent, and immaterial.

The COURT. I have held all through that the fee has not passed by the act, and does not until the outside land committee determines and passes upon it, and the mayor executes a deed.

Mr. SHARP. Then it is pertinent to show where the title was, and that they could not be tenants in common.

The COURT. I have already held that they are not tenants in common.

Mr. SHARP. I think that by the stipulation all of this is in, because it was in at the last trial of the case, together with the rulings then made.

(Here the defendants rest.)

Testimony for plaintiff in rebuttal.

Mr. Holladay offers in evidence a deed from Aaron Fleishacker to Rice and McConnell, dated Feb. 10, 1855, acknowledged February 15, 1855, and recorded October 26th, 1855; purporting to convey an undivided half of the DeBrot tract, and also an undivided half of the Levi and Fleishacker tract going south of it.

270 Also, a deed from James Rice to Joseph S. Friedman, dated April 26th, 1856, acknowledged the same day, recorded June 26th, 1866, purporting to convey an undivided interest equal to five acres in the Levi and Fleishacker tract.

Mr. SHARP. We object to that as incompetent and irrelevant, and because on this trial both the plaintiff and his counsel have disclaimed claiming anything under this deed.

Mr. HOLLADAY. If I am correct in my theory, this Levi and Fleishacker claim lies south of this tract; but if their theory is true, that it forms a part of the tract, then we have an interest in it, and I ask to put it in yet.

The COURT, (after discussion.) I will overrule the objection; note an exception. (Exception No. 23.)

Mr. HOLLADAY. As to the land conveyed by Samuel Fleishacker to Aaron Fleishacker, Aaron Fleishacker conveys an undivided half of it to Rice and McConnell—conveys all his interest—afterwards Rice and McConnell convey back to Aaron Fleishacker, before it comes to Peter Donahue, and I want to put in those deeds.

I offer a deed from James Rice to Aaron Fleishacker, dated March 1st, 1865, acknowledged March 2d, 1865, recorded March 3d, 1865, in liber 273 of deeds, page 385. The deed describes the DeBrot tract.

Also, a deed from J. R. McConnell back to Aaron Fleishacker of the DeBrot tract, dated March 29th, 1865, acknowledged the same

271 day, recorded April 8th, 1865, in liber 283 of deeds, page 190.

S. W. NEWHALL, recalled for the defendants, testifies that there are $8\frac{4}{10}$ acres of the Fleishacker and Levy tract inside of the Donahue fence, and the 80-acre Fleishacker tract.

Mr. HOLLADAY. I offer in evidence a power of attorney from Israel E. Woolf to George H. Davis, revoking the one theretofore given to Louis Cohn, dated June 29th, 1861, recorded September 12th, 1861, before the recording of the power of attorney from Woolf to Cohn.

Mr. SHARP. Long after Cohn had deeded to Labatt.

Mr. HOLLADAY. Unless I may have omitted some link, I believe I am ready to close.

Mr. SHARP. We shall move to strike out the deed of Gautier and Hastings to Friedman, upon the ground that from the evidence it appears that Gautier and Hastings had no interest at the time of the alleged deed. That deed was made in 1867. The construction your honor put upon the deed of Gautier and Hastings to Donahue was, that it conveyed all the title of Hastings and Gautier; that he having conveyed a sixth, and only having obtained from Labatt and Cardoza a fourth at the time of the deed from Gautier to Friedman, neither Gautier nor Hastings had any interest whatever in the property. They had conveyed to Donahue all that remained in them, and had given

272 possession more than five years before the date of the alleged deed to Friedman. We say the deed is immaterial, and conveys nothing.

The COURT. (After argument.) I think it would be an interference with the province of the jury. I shall deny the motion to strike out.

Mr. SHARP. We except. (Exception No. 25.)

The foregoing was all the evidence in the case, and the evidence was here closed.

The court then charged the jury, as follows:

GENTLEMEN OF THE JURY: I most cordially congratulate you that we have come so near the close of this case. This case, in some respects, has been instructive; if in no other, we have learned the power of human endurance; you no doubt think that you have suffered much in this case, but in that point of view, you know very little of it, when you reflect that this is the third trial; but while parties who have rights that must be respected in courts of justice have a right to bring them here for adjudication, we have no right to complain; yet under all the circumstances I think the court may be excused in indulging the hope that your verdict will finally dispose of this case in such a manner that the court will never be troubled with it again.

There are few principles of law, which at first blush appear to be intricate in this case, that should govern it, but which, as matter of
273 fact, are simple when properly understood. The plaintiff in this case, as I understand, now claims that he is entitled, first, to a verdict for a portion of the land described in his complaint; that he was entitled to a portion of the whole, or a portion of the land described in the complaint, on the ground of prior possession; or rather, his first ground was that he is a tenant in common with Peter Donahue. You are instructed, gentlemen, that such a thing as a tenancy in common as known to the law, cannot exist except as between parties who own the fee to the land, and I have been asked to instruct you that the party cannot recover on the ground of tenancy in common, unless the plaintiff and the defendants, either now or at some time, held the fee to the land; as an abstract proposition I so instruct you, but I do not instruct you as asked by the defendants' counsel, that where parties enter upon land in good faith together, agreeing to keep that land, the one for the other, until such time as a title will be perfected, that if one party undertakes to, and does oust the other from possession, that other cannot recover.

(To all of which portion defendants then and there excepted. Exception No. 27.)

In other words, if Peter Donahue or his grantors agreed with the plaintiff Friedman, or his grantors, that this land should be occupied by them in common, the one to act for the other, in that case the party who is ousted, if it is the plaintiff in this case, can recover what-
274 ever interest the parties agreed that the other should possess in an action of ejectment, unless the statute of limitations should obtain, or that the party in possession hold adversely as to the other for the period of five years before the commencement of this suit. In this State, our statute of limitations is peculiar. It differs, so far as I am advised, from that of any other State. A party as against a superior proprietor, always excepting the United States Government, can obtain a title to land. For instance, if Mr. Turner, one of your number, holds the absolute fee to a piece of property, the perfect title as against all the world, and Mr. Hatch, another of your number, enters in upon that property and holds it adversely to Mr. Turner for the period of five years, in law the title becomes absolutely vested in him, and Mr. Turner cannot recover. In other words, why it is different in this State from

other States is, in other States it does not work a title; in this State it does.

I am asked to instruct you on behalf of the plaintiff, in substance, that a consideration mentioned in a deed is immaterial; as in this case the consideration paid by Mr. Friedman is immaterial, so far as Donahue is concerned. I do so instruct you, gentlemen. That is immaterial so far as passing an interest is concerned. They have a right to go in and show what the consideration was, so as so show from all the surrounding circumstances the character of the transaction. But it is cer-
275 tainly immaterial, so far as relates to Mr. Donahue, whether Mr. Friedman pays $500, the real value of the property, or whether he gets it for $5. That is a matter entirely between Friedman and his grantor. If his grantor has suffered and has any legal remedy, the courts will give it to him; but it is immaterial to Mr. Donahue whether he paid one dollar or $500; the title would pass for a small consideration equally as with a great. In regard to this instrument, dated May 23d, 1861, I have drawn some instructions I shall give you in regard to it; and I wish to remark further, because I have not gone over the ground fully. It is contended here that this instrument works an estoppel as against Donahue—that is, that if the statement made in this instrument is untrue, to wit, that Woolf was vested at a certain time with a certain interest in that estate, even though that statement was untrue, yet, having been made, and Friedman having acted under it, that Donahue is bound by it; that he cannot come in now and say—he is estopped from saying, that such is not the truth. In extreme cases such a rule is enforced, particularly where statements of that character are made with fraudulent intent, because the law says that a party shall not take advantage of his own wrong. If he should make that representation for the purpose of deceiving, then he would be estopped from denying it, because he has no right to hold forth to the world a certain state of facts as existing for a sinister motive, or even when he knows such a
276 fact is untrue; but where a party makes a mistake in a statement of that character, acts in good faith under inadvertance, he is not bound by it, and is not estopped. Papers of that character are always explainable, precisely as in the case of a receipt. If you are indebted to a party in the sum of $500, and he gives you a receipt for $250 only, by mistake or otherwise, that receipt is always explainable. You can come in and show all the surrounding circumstances, and if this paper was signed by Peter Donahue in good faith, under the circumstances as they conte'd, he is not bound by that declaration.

It is contended here on behalf of counsel for Donahue (I say Donahue because there are several defendants) that this paper never was delivered, and never was intended to be delivered until a companion-paper was executed by certain other parties; that is, that this paper was executed and deposited with one Bixler, with the understanding that when Henry J. Labatt and others should execut' a disclaimer, that both papers were to be delivered and to take effect; and that this paper, as a matter of fact, never was delivered in pursuance of that understanding, but that possession was surreptitiously obtained of it by the parties who got it from Bixler; that Bixler had no right to deliver that paper until the companion-paper was executed and delivered. If that was the understanding between the parties, this paper should have no effect
277 whatever, as evidence or otherwise, because very often persons in good faith may execute a paper acknowledging a thing that they know does not exist, for the reason that they get some corresponding consideration. It is very common here that where persons squat upon

land, you go and acknowledge their rights; you give them a deed for a piece of land, a part of the whole tract, in order to get a deed from them of the remainder, not because you wish to acknowledge they have a title, but to buy peace; and you do tacitly acknowledge their right by giving them a deed, which you have a right to do, to avoid the expenses of litigation, and which it is commendable to do; therefore, if this paper was executed under those circumstances, and was not delivered in pursuance of that arrangement, it should have no effect with you whatever, unless it is corroborated by facts showing that Woolf did have that or some other interest in the premises.

The plaintiff in this action claims to recover possession of the land described in his complaint. I will state right here that I understand there is a larger portion of the land described in the complaint than is really claimed. I instruct you that a party has a right to sue for as much as he has a mind to. Of course he is entitled to recover only such portions of what he sues for as he shows himself entitled to. The
278 fact that he sues for more than he is entitled to should not be taken against him. He may sue for a fifty-vara lot, when, in fact, he is entitled to recover simply a building-lot, twenty feet front.

The plaintiff in this case claims to recover a portion of the land described in his complaint on the ground, as he asset's, first, that he is a tenant in common with Peter Donahue. I have already instructed you that they cannot be in law tenants in common, unless both parties own the fee, and I will instruct you that there has no evidence yet been adduced showing that the fee to this land has passed either to the plaintiff or the defendants, or either of their grantors.

[In the same connection, I have instructed you before that there may be, and has in effect been acknowledged by the legislation of this State, and recognized by the Supreme Court, a tenancy in possession, as between parties who claim but have no fee to the land; not a tenancy in common, as in the legal sense, but a tenancy in possession.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 28.)

Second. [By virtue of prior possession of plaintiff's grantor and possession of those under whom he claims.]

(To all of which portion marked in brackets, defendants there and then excepted. Exception No. 29.)

279 It is your province to decide as to the facts of this case; as far as you are concerned the court is not supposed to have any opinion as to the facts or any fact in the case. The plaintiff claims by virtue of prior possession, and that the right of possession has concentrated in him and Peter Donahue; that is on the hypothesis that they were tenants in possession, that he owns a fractional interest in those lands and that he has a right to be let into possession with his co-tenant, Donahue, and Donahue's tenants. Lest you may be misled by the term tenants in common, as jurors very often are from the fact that the word tenant is used—a tenant, in the popular sense, being a party who leases ground—it is proper I should state what a tenant in common is. If you twelve gentlemen own a piece of property, the title of which is vested in you, each one having a twelfth, whether from the same source, by deed or by descent, you would be tenants in common in the land. The law designates persons holding property under such circumstances as tenants in common. The defendants claim—

First. That the plaintiff or his grantors were never in possession of the land in controversy or any part of the same.

Second. That the plaintiff or his grantors, if they ever were in pos-

session of the premises described in the complaint or any part of them, have abandoned that possession, and that they abandoned the possession prior to the commencement of this suit. In regard to pos-
280 sessory actions, persons claiming to be in possession of lands not belonging to them, although they may be in the actual possession and enjoyment of them for years, if they abandoned that possession in good faith, abandon it without any intention of returning to the property, they or their subsequent grantees cannot recover against whoever thereafter may be found in possession.

Third. That the plaintiff has no title or right to the possession of the premises whatever.

Fourth. That if the plaintiff ever had any title or right of possession to the premises, or any part of them, if he had such right as tenant in common with the defendant, Donahue, or otherwise, such right or interest is barred by the statute of limitations. As to the statute of limitations, if the plaintiff or his grantors were at any time entitled to the possession of those premises, [and he or his grantors did not hold as tenants in common.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 30.)

Then if Donahue, or his grantors, held the exclusive possession for five years before the commencement of this suit, Friedman is barred from recovery. [When tenants in common hold property, and one tenant being in possession in some notorious way by his words, or by his disclaiming the interest of his co-tenant, or by his acts conducts
281 himself in such a way as to give the world notice that he holds it for himself and denies the right of his co-tenant, and so holds it for five years, then the statute of limitations obtains as between them, in favor of the party who so holds and so announces to the world.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 31.)

That is, not five years from this time, but five years prior to the commencement of this suit. [Tenants in common are persons who hold the fee, and hold by unity of possession, and they may hold by several and distinct titles, or by titles derived at the same time by the same deed or descent. Each tenant in common is considered to be solely or severally seized of his share. A tenant in common in possession of land is presumed in law to hold the same for himself and his co-tenant in common, unless he holds adversely to them or some of them. For example, if Peter Donahue held land as a tenant in common with the plaintiff, but did not hold the same adversely to him, the holding of such possession by Donahue would in law be the possession of the plaintiff as well as the possession of Donahue, and the statute of limitations would not obtain in favor of Donahue, even though he might have held the actual possession for a period of five years before the commencement of this suit, if he did not hold adversely to the plaintiff.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 32.)

282 But one tenant in common may acquire title as against his co-tenants in common by an actual adverse holding for five years before the commencement of the action for the recovery of the land.

[When persons hold lands as tenants in common, all persons so holding are entitled to equal possession. In the language of one of the judges of our supreme court, they are entitled to an equal possession to the last grain of sand and the last spear of grass.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 33.)

But if the tenant in common is in possession of the land and refuses to allow his co-tenant to enjoy such possession with him, such refusal is in law an ouster; in other words, the law says by such refusal he has turned his co-tenant out of his rightful possession.

[If a person in possession of land as a tenant in common with another, commits no act or does nothing indicating that he is not willing that his co-tenant should come in and occupy with him, then an action cannot be maintained by his co-tenant for the recovery of the possession, or to be let into possession.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 34.)

283 To enable one tenant to recover against, or be let into possession with, his co-tenant, something must be proven tending to show refusal on the part of the co-tenant in possession to admit him into possession with him. This showing is claimed to have been made by demand on the part of the plaintiff to be let into possession, and refusal on the part of the defendant to such demand.

[If such a demand were made and the defendant refused to comply with it, and the plaintiff and defendant were tenants in common, and the defendant had not held adversely five years before the commencement of this suit, it was sufficient to establish an ouster, and this action can be maintained by the plaintiff, unless the statute of limitations has obtained.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 35.) [If you find from the evidence that Donahue has only an undivided part of the title derived from the common grantor, or source under which the plaintiff and defendants both claim, and that the plaintiff has another part of that title, then the plaintiff is entitled to recover as to such interest, unless the statute of limitations has intervened.]

(To all of which portion marked in brackets, defendants then and there excepted. Exception No. 41.) If you find from the evidence that

284 Donahue or any of the defendants were not tenants in common with the plaintiff in the land in controversy at the time of the commencement of this action, and that Donahue, by himself or his tenants, or any of the defendants, had been in the actual adverse and exclusive possession of the premises described in the complaint, or that portion thereof claimed by the plaintiff, for a period of five years before the commencement of this action, your verdict will be for the defendants; or, if you find that the defendant or Donahue held the land in controversy for a period of five years, immediately preceding the commencement of this action, adversely to the plaintiff and his grantors, [even though they were, prior thereto, tenants in common.]

(To all of which portion, defendants then and there excepted. Exception No. 36.)

The statute of limitations will be a bar to recovery by the plaintiff, for the reason that, under our statute of limitations, an adverse holding by one tenant in common against his co-tenant for the period of five years would bar a recovery.

Possession of land is prima-facie evidence of title; that is, a party in possession of land, in the absence of any proof to the contrary, is presumed to have the title to the land so possessed. But such presumption can be overturned by proof of possession of other parties, or that the eal title is vested in another.

285 The lands in controversy are not within the purview of the so-called "Van Ness ordinance," and as regards the nature of possession under which a person holds in this city and county by virtue of possession, the rule is different. Under the Van Ness ordinance, according to the adjudication of our supreme court, the possession must be actual. [While to hold the land in controversy, it would be sufficient to show the party claiming the same, either by himself or his agents or tenants, resided upon or cultivated the same or put the same to some appropriate use, and excluded all others therefrom.]

(To all of which portion of the charge marked in brackets defendants then and there excepted. Exception No. 37.)

The paper executed by the defendant Donahue, dated May 23d, 1861, has been read by the plaintiff. You have heard the criticisms of the respective counsel in regard to it. Whatever their opinions are in regard to it, it is your duty to take the construction put upon it by the court as to its effect in evidence. It would not, and does not, of itself, convey any title, and can only be considered by you in connection with the other evidence in the case as to the rights of the respective parties; and if you find from the evidence that, at the time or times referred to in that paper, Woolf, the person therein named, had not in fact any interest in the land, [either as tenant in common or otherwise,]

(to this portion marked in brackets, defendants then and there
286 excepted—Exception No. 38,) and there was no fraud on the part of Donahue in the execution or delivery of that paper, you will not give that instrument any weight as evidence in your deliberations. If a person in good faith, not understanding a fact, by mistake, inadvertence, or otherwise, makes a written statement contrary to the fact, he is not bound by it in law. Such a statement is explainable in courts of justice, and if the paper was not delivered by Donahue, or some person on his behalf or by him authorized, no estoppel would be worked by it against him, nor can it be worked in favor of any person.

Prior possession, as I before stated, is prima-facie evidence of title. Proof of prior possession not abandoned is sufficient to enable a party to recover against any subsequent possessor, unless the statute of limitations has intervened, or such other person has become vested with the fee or right of possession.

If you find that the plaintiff, or those under whom he claims, or one or more of them, had a bona-fide possession of the lands in controversy, or some part of the same, and that such possession has not been abandoned, and had not been abandoned before the entry of the defendants, or some one of them, the plaintiff is entitled to recover that portion of the premises so possessed and not abandoned, if the right to the same has not been barred by the statute of limitations.

If you believe, from the evidence, that the plaintiff, or those
287 under whom he claims, had a prior possession, which he has succeeded to, of or to the whole or any part of the lands in controversy, and there has been no abandonment of such possession, and the defendants entered and ousted the plaintiff or his grantors therefrom, at any time within five years before the commencement of this action, the plaintiff is entitled to recover. The instruction that the statute of limitations is not a bar to the plaintiff's action, if the defendants did not hold adversely to the plaintiff or his grantors for five years, is upon the condition that the defendants, or he or they under whom they claim, have not succeeded, by mesne conveyances or otherwise, to the title or right of possession of the plaintiff or his grantors under which he seeks to recover in this action. There has been no proof

as to the value of this land, the rental value; therefore it will not be necessary, if you find for the plaintiff, to assess the damages for the detention of the land.

If you find for the plaintiff, you will state, by your verdict, what portion of the land he is entitled to recover; or, in other words, if he is entitled to recover from prior possession, and not by reason of tenancy in common or tenancy in possession, what portion of the land described in your verdict he may be entitled to recover. [If you find that they were tenants in common or tenants in possession, then you will state the interest he is entitled to recover. If, for instance, in an 80-acre tract, he is entitled to recover at all.]

288 (To all of which portion defendants then and there excepted. Exception 39.)

You will state by your verdict what portion of that 80-acre tract he is entitled to recover; if you should think it is equal to ten acres, or five acres, or one acre, as the case may be, state by your verdict what proportion he is entitled to recover, [because where two parties are tenants in common, one party may hold a 45-one-hundredths interest, and another party an interest of 55-one-hundredths.]

(To all of which portion defendants then and there excepted. Exception No. 40.)

As I before stated, you are the sole judges of the facts of the case; you are also the sole judges of the credibility of the witnesses. If you find the testimony conflicting, it is your duty in your deliberations to take all the facts and circumstances into consideration, and endeavor to harmonize the testimony so as to do justice to the parties, if possible, without leaving the stigma of perjury resting against any individual.

Abandonment of land can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself, and is regardless and indifferent as to what may become of it in the future. [If a person in possession of land leaves it with the intention to return to it, he does not abandon it. Abandonment only takes place

289 where one in possession leaves with the intention of not again returning and resuming possession. Abandonment, therefore, is a question of intention.]

(To all of which portion defendants then and there except. Exception No. 42.)

Mere lapse of time does not constitute abandonment, but it may be considered in evidence in connection with other facts and circumstances, for the purpose of ascertaining the intention of the party. [If one in possession of land leave it with the intention of returning, his mere failure to occupy it for a series of years does not necessarily constitute abandonment.]

(To all of which portion defendants then and there except. Exception No. 43.)

Until abandoned, he may recover against trespassers, unless his cause of action has been barred by the statute of limitations, or he has in some manner divested himself of his right of possession.

I have already held that the deed from Gautier to Friedman conveyed no title whatever, provided he had conveyed his interest theretofore in the deed to Donahue. It is a peculiarly drawn deed. [It conveys all his interest in the land "except the following." Other deeds have been put in evidence, which tend to show, and it is for you to decide whether they do or not, that he had already conveyed this very land which he undertook to except.]

285 The lands in controversy are not within the purview of the so-called "Van Ness ordinance," and as regards the nature of possession under which a person holds in this city and county by virtue of possession, the rule is different. Under the Van Ness ordinance, according to the adjudication of our supreme court, the possession must be actual. [While to hold the land in controversy, it would be sufficient to show the party claiming the same, either by himself or his agents or tenants, resided upon or cultivated the same or put the same to some appropriate use, and excluded all others therefrom.]

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The paper executed by the defendant Donahue, dated May 23d, 1861, has been read by the plaintiff. You have heard the criticisms of the respective counsel in regard to it. Whatever their opinions are in regard to it, it is your duty to take the construction put upon it by the court as to its effect in evidence. It would not, and does not, of itself, convey any title, and can only be considered by you in connection with the other evidence in the case as to the rights of the respective parties; and if you find from the evidence that, at the time or times referred to in that paper, Woolf, the person therein named, had not in fact any interest in the land, [either as tenant in common or otherwise,]

(to this portion marked in brackets, defendants then and there
286 excepted—Exception No. 38,) and there was no fraud on the part of Donahue in the execution or delivery of that paper, you will not give that instrument any weight as evidence in your deliberations. If a person in good faith, not understanding a fact, by mistake, inadvertence, or otherwise, makes a written statement contrary to the fact, he is not bound by it in law. Such a statement is explainable in courts of justice, and if the paper was not delivered by Donahue, or some person on his behalf or by him authorized, no estoppel would be worked by it against him, nor can it be worked in favor of any person.

Prior possession, as I before stated, is prima-facie evidence of title. Proof of prior possession not abandoned is sufficient to enable a party to recover against any subsequent possessor, unless the statute of limitations has intervened, or such other person has become vested with the fee or right of possession.

If you find that the plaintiff, or those under whom he claims, or one or more of them, had a bona-fide possession of the lands in controversy, or some part of the same, and that such possession has not been abandoned, and had not been abandoned before the entry of the defendants, or some one of them, the plaintiff is entitled to recover that portion of the premises so possessed and not abandoned, if the right to the same has not been barred by the statute of limitations.

If you believe, from the evidence, that the plaintiff, or those
287 under whom he claims, had a prior possession, which he has succeeded to, of or to the whole or any part of the lands in controversy, and there has been no abandonment of such possession, and the defendants entered and ousted the plaintiff or his grantors therefrom, at any time within five years before the commencement of this action, the plaintiff is entitled to recover. The instruction that the statute of limitations is not a bar to the plaintiff's action, if the defendants did not hold adversely to the plaintiff or his grantors for five years, is upon the condition that the defendants, or he or they under whom they claim, have not succeeded, by mesne conveyances or otherwise, to the title or right of possession of the plaintiff or his grantors under which he seeks to recover in this action. There has been no proof

as to the value of this land, the rental value; therefore it will not be necessary, if you find for the plaintiff, to assess the damages for the detention of the land.

If you find for the plaintiff, you will state, by your verdict, what portion of the land he is entitled to recover; or, in other words, if he is entitled to recover from prior possession, and not by reason of tenancy in common or tenancy in possession, what portion of the land described in your verdict he may be entitled to recover. [If you find that they were tenants in common or tenants in possession, then you will state the interest he is entitled to recover. If, for instance, in an 80-acre tract, he is entitled to recover at all.]

288 (To all of which portion defendants then and there excepted. Exception 39.)

You will state by your verdict what portion of that 80-acre tract he is entitled to recover; if you should think it is equal to ten acres, or five acres, or one acre, as the case may be, state by your verdict what proportion he is entitled to recover, [because where two parties are tenants in common, one party may hold a 45-one-hundredths interest, and another party an interest of 55-one-hundredths.]

(To all of which portion defendants then and there excepted. Exception No. 40.)

As I before stated, you are the sole judges of the facts of the case; you are also the sole judges of the credibility of the witnesses. If you find the testimony conflicting, it is your duty in your deliberations to take all the facts and circumstances into consideration, and endeavor to harmonize the testimony so as to do justice to the parties, if possible, without leaving the stigma of perjury resting against any individual.

Abandonment of land can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself, and is regardless and indifferent as to what may become of it in the future. [If a person in possession of land leaves it with the intention to return to it, he does not abandon it. Abandonment only takes place

289 where one in possession leaves with the intention of not again returning and resuming possession. Abandonment, therefore, is a question of intention.]

(To all of which portion defendants then and there except. Exception No. 42.)

Mere lapse of time does not constitute abandonment, but it may be considered in evidence in connection with other facts and circumstances, for the purpose of ascertaining the intention of the party. [If one in possession of land leave it with the intention of returning, his mere failure to occupy it for a series of years does not necessarily constitute abandonment.]

(To all of which portion defendants then and there except. Exception No. 43.)

Until abandoned, he may recover against trespassers, unless his cause of action has been barred by the statute of limitations, or he has in some manner divested himself of his right of possession.

I have already held that the deed from Gautier to Friedman conveyed no title whatever, provided he had conveyed his interest theretofore in the deed to Donahue. It is a peculiarly drawn deed. [It conveys all his interest in the land "except the following." Other deeds have been put in evidence, which tend to show, and it is for you to decide whether they do or not, that he had already conveyed this very land which he undertook to except.]

290 (To all of which defendants except. Exception No. 44.)

It is a rule of law that where a party executes a solemn instrument, that he does it for some good purpose, that he does it to attain some object, and therefore the courts will construe a paper so entered into by him, in such a way as to effect some object. Now, I say, a fair construction of this instrument is, that if those deeds bear out the statement made by defendants' counsel, that he had already sold that portion that he excepted, that instead of excepting that property he merely meant to convey all the interest he had in the property, because afterwards he conveys all his interests in the land except—except what? Except what he had already sold. Hence he had conveyed all the interest he had at the time he made the instrument.

Defendants' counsel requested the court to charge the jury as follows:

DEFENDANTS' INSTRUCTIONS, No. 1.

"If you believe from the evidence that neither Samuel Fleishacker, Woolf, Davis, or Labatt, ever enclosed or cultivated any portion of the premises in the complaint described, except a small enclosure about the so-called Fleishacker house, then whatever right of possession they or either of them acquired, was and must be limited to the actual possession then acquired or held."

291 The court refused to so charge the jury, to which ruling the defendants then and there excepted. Exception No. 45.

Defendants' counsel asked the court to charge the jury as follows:

DEFENDANTS' INSTRUCTIONS, No. 2.

"If you believe that, in and by the deeds from Woolf and Davis to Fleishacker, the mortgage back by the latter, the sheriff's deed founded thereon, the 80-acre survey was not described, but the lands therein described were confined to the De Brot tract, and excluded the Atsupard tract as laid down on defendants' Exhibit No. 2, then you may and should regard such deed and mortgage as an abandonment of the 80-acre survey, and the alleged tenancy in common thereafter is to be confined to the De Brot tract, and to exclude the Atsupard tract."

The court refused to so charge the jury, to which ruling the defendants then and there excepted. Exception No. 46.

Defendants asked the court to charge the jury as follows:

DEFENDANTS' INSTRUCTIONS, No. 3.

"One tenant in common is under no obligations to keep possession of, fence or pay taxes upon, the property claimed jointly for the benefit of his co-tenant; hence, if you believe from the evidence that neither Donahue, Woolf, or plaintiff kept possession of so much of the 80-acre
292 Fleishacker tract or De Brot tract as is outside of the lands described in the complaint, and defendant Donahue did at his own expense keep possession of all of said tract situate within the limits described in the complaint, and such portion so within was more than one-half such tract, then there must be deducted from any interest plaintiff claims, and charged to plaintiff, the whole of the portion of the premises which defendant Donahue was entitled to out of the portion of the premises which defendant Donahue has kept possession of, and plaintiff can only recover the undivided number of acres, if any, to which he may be entitled after making such deductions."

The court refused to so charge the jury; to which ruling of the court defendants then and there excepted. (Exception No. 47.)

The charge of the court having been concluded, the jury retired to consider their verdict, and thereafter returned into court with a verdict for plaintiff, which said verdict is as follows, viz:

J. S. FRIEDMAN, PLAINTIFF,
vs.
MCSTAY ET ALS.

In the fifteenth district court in and for the city and county of San Francisco.

We, the jury in the above case, do find for the plaintiff as follows:

No. 1. Entitled the De Brot tract, containing 34 $\frac{30}{100}$ acres, one-fourth being 8.57$\frac{1}{2}$ acres.

293 No. 2. Being that portion of the Fleishacker claim in the most southerly corner, and outside the De Brot tract, containing 8$\frac{57}{100}$, one-half.

No. 3. Being that portion of the Fleishacker claim lying to the north and east of the De Brot tract, and embraced within the Donahue tract, containing 15 $\frac{66}{100}$ acres, one-half being 7.83 acres. The whole amounting to twenty and sixty-nine one-hundredths acres, (20.69.)

The above numbers, "1," "2," and "3" refer to the diagram of V. Wackenreuder, in plaintiff's Exhibit No. 2.

W. G. Doolittle, foreman; Asa D. Hatch, Thos. J. Fay, Bradbury Sanborn, David E. Dickerson, J. M. Russell, C. T. Forrest, R. H. Adams, G. W. Clapp, C. H. Seitz, R. B. Turner, F. J. Hoin.

San Francisco, Cal., Jan. 11th, 1872.

The defendants now move for a new trial, and make this their statement of the evidence presented on trial, and specify the grounds of the motion as follows:

294 I.

Insufficiency of the evidence to justify the verdict and judgment.

II.

And that the verdict and judgment were against the evidence, as follows, and the defendants specify the particulars wherein the evidence was insufficient to justify the verdict and judgment, wherein the same is against law, as follows, to wit:

First. The evidence was insufficient, and did not show or tend to show any title in the premises in controversy in plaintiff, or that plaintiff ever had any right of entry upon, or right of possession to, the premises in complaint described, or any part thereof.

Second. The evidence did not show or tend to show that plaintiff, or those under whom he claimed, ever had the actual or any possession of the said premises, or any part thereof.

Third. The evidence did show that Donahue entered upon and took possession of the premises in controversy in his own right and for himself, and for no other person, and that he had and held the actual, exclusive, and notorious occupancy and possession of said premises for more than five years, and more than ten years before the commence-

ment of this suit, adversely to the plaintiff, and those under whom he claims, and all the world besides.

295 Fourth. The evidence showed that defendant Donahue purchased the premises, in complaint described, in May, 1861, and interest therein in good faith, claiming the same as his own exclusively, and adversely to plaintiff and all the world besides, and continued, and ever since has been, in the bona-fide possession thereof, so adversely therein, hitherto, until on and after the 8th day of March, 1866, until on and after the commencement of this action, and until the present time.

Fifth. The evidence entirely failed to show that plaintiff, or those under whom he claimed, or either of them, ever had such prior possession of or title to the premises in controversy, or of any part thereof, as would entitle plaintiff to recover the same or the possession thereof in this action.

Sixth. The evidence showed that Gautier and Hastings conveyed no part of the premises in controversy to plaintiff, and that they had conveyed all their interest in the premises to the defendant Donahue and other parties than the plaintiff or his grantors before the alleged deed from them to said plaintiff.

Seventh. The evidence showed that Israel E. Woolf had no interest in the premises or any part thereof at the time of the execution of the deed from him to the plaintiff, and that the plaintiff took nothing by said deed.

Eighth. The evidence showed that the alleged Fleishacker "new survey," so called, was never fenced, improved, or occupied by

296 Samuel Fleishacker, Davis, or Woolf, or any person else, but was abandoned.

Ninth. The evidence shows that plaintiff and those under whom he claims, if he or they ever had any claim or interest in the DeBrot claim, or the Fleishacker claim, or the portions of said claim inside of the Donahue fences, he and they abandoned the same long, viz, more than ten years, before the commencement of this action.

Tenth. There was no evidence to show that plaintiff was entitled to, or to recover possession of, one-fourth of the DeBrot tract, or any portion thereof inside of the Donahue fences, or one-half of the Fleishacker claim in the most southerly corner, and outside of the DeBrot tract, or any portion of this Fleishacker claim inside of the premises in complaint described, or any portion of the Fleishacker claim north and east of the DeBrot tract, and embraced within the Donahue tract.

Eleventh. The evidence shows that the computations of the jury in their verdict are each and all incorrect and unreliable.

Twelfth. The verdict is contrary to the evidence, and against law and the charge of the court, and vague, uncertain, and void, in not finding whether the several portions of the premises found by the jury by their verdict in favor of the plaintiff, was divided and segregated, or

297 an undivided interest, and, if divided and segregated, in not defining the same by metes and bounds, or some definite description.

Thirteenth. The verdict is against law and the charge of the court, and contrary to the evidence in this, that the verdict is against the defendants for lands which they have not and never had in possession.

Fourteenth. The jury should have disregarded the paper signed by Donahue, dated May 23d, 1861.

Fifteenth. The verdict is against law, and contrary to the charge of the court, and is not sustained by the evidence. The court charged the jury that the paper, dated May 23d, 1861, signed by Donahue, did not

convey any title, and that if at the time it was given, Woolf had no interest in the premises, then they would give no weight to it. It appears by the evidence that Israel E. Woolf, the person named in said papers, conveyed all his interest in the premises to Labatt on the 26th day of February, 1861.

Sixteenth. The verdict is against law, and contrary to the charge of the court, and is not sustained by the evidence, in this: The court charged the jury that if Woolf had no interest at the time of the execution of the instrument, dated May 23d, 1861, that would be sufficient evidence to show that the defendant Donahue was laboring under a mistake at the time he executed it, and it appears by the evidence that Woolf had at that time no interest in the premises.

289 Seventeenth. The verdict is against law, and is contrary to the charge of the court, in this: The court charged the jury that if they found that plaintiff and defendant are tenants in common, they will find what the interest of the plaintiff in common with defendants is; whereas the jury found, in favor of the plaintiff an undivided interest of nineteen and one-half acres in a large tract, a portion of which is in defendants' possession, and a portion of which is not, and did not find what the interest of plaintiff in common with defendant is; neither did they find whether or not plaintiff and defendants are tenants in common in any portion of the land in defendants' possession.

Eighteenth. The verdict is against law, and is contrary to the charge of the court, in this: The court instructed the jury that if they find plaintiff and Donahue are tenants in common, they will so state, and what portion they are tenants in common, and the fractional interest the plaintiff has in the premises; the verdict is in favor of the plaintiff for an undivided interest, but fails to refer to either of the points above instructed by the court. The verdict does not find that plaintiff and defendants are tenants in common in any quantity of land; and does not find that plaintiff has any interest in any specific tract of land in possession of the defendant.

III.

299 Errors in law, occurring at the trial, and duly excepted to by the defendants, which particular errors defendants specify as follows, viz:

The court erred in admitting in evidence the deed from DeBrot to Fleishacker, Davis, and Woolf. (See Exception No. ½ in the foregoing statement, p. 20, fol. 57.)

The court erred in refusing to strike out so much of Labatt's deposition as related to the delivery of the paper indorsed, "Acknowledgement," dated May 23d, 1861. (See Exceptions Nos. 1 and 2 in the foregoing statement, pp. 21, 22, fol. 60, 4.)

The court erred in permitting Wores to testify in relation to the delivery of the paper to Donahue. (See Exception No. 3 in the foregoing statement, p. 27, fol. 79.)

The court erred in admitting the evidence of Friedman, as to demand and refusal to be let into possession. (See Exception No. 4 of the foregoing statement, p. 54, fol. 161.)

The court erred in admitting the evidence of Friedman in relation to his purchase. (See Exception No. 5 of the foregoing statement, p. 60, fol. 178.)

The court erred in admitting in evidence, against defendants' objection, the paper marked "Acknowledgment," of Donahue, marked "Plaint-

iff's Exhibit No. 14 or 4." (See Exception No. 6 of the foregoing statement, p. 65, fol. 192.)

The court erred in admitting in evidence a copy of the record of the plan and notes of the Robt. B. Hayes survey. (See Exception No. 7 of the foregoing statement, p. 68, fol. 201.)

300 The court erred in admitting in evidence a copy of the covenant of Fleishacker to Woolf and Davis. (See Exception No. 8 of the foregoing statement, p. 68, fol. 203.)

The court erred in admitting in evidence the deed from Woolf and Davis to Fleishacker. (See Exception No. 9 of the foregoing statement, p. 69, fol. 205.)

The court erred in admitting in evidence the foreclosure-proceedings and mortgage in case of Woolf et als. vs. Fleishacker, and also the sheriff's deed. (See Exceptions Nos. 10 and 11 of the foregoing statement, pp. 69–70, fol. 206 & 207.)

The court erred in admitting in evidence the deed from Cardoza et al. to Gautier. (See Exception No. 12 of the foregoing statement, p. 71, fol. 209.)

The court erred in admitting in evidence the deed from Gautier and Hastings to Friedman. (See Exception No. 13 of the foregoing statement, p. 72, fol. 213.)

The court erred in admitting and refusing to strike out the deed from Fleishacker to Woolf and Davis. (See Exception No. 8 of the foregoing statement, p. 68, fol. 203.)

The court erred in refusing to grant defendant's motion for a nonsuit. (See Exception No. 14 of the foregoing statement, p. 75, fol. 222.)

The court erred in refusing to strike out the instrument specified in Exception No. 15. (See Exception No. 15 of the foregoing statement, p. 77, fol. 228.)

The court erred in striking out that portion of Donahue's testi-
301 mony in which he states he bought, improved, and paid for the premises. (See Exception No. 16 of the foregoing statement, p. 96, fol. 286.)

The court erred in striking out that portion of Donahue's testimony in which he denies having delivered plaintiff's Exhibit No. 14. (See Exception No. 16½ of the foregoing statement, p. 97, fol. 288.)

The court erred in striking out Donahue's answer to the effect that he did not know Israel E. Woolf at the time he signed that paper. (See Exception No. 17 of the foregoing statement, p. 102, fol. 303.)

The court erred in refusing to allow defendants to prove certain facts by witness Grey to the effect that witness wrote to Woolf, at the instance of Friedman, and obtained a power of attorney to make the conveyance of Woolf to Friedman; that no consideration was paid to Woolf; that Grey, Brandon, and Friedman were each to have an interest in the premises conveyed, and that he ignored, before and since making the deed, that he had any connection with Donahue, or that he, Friedman, made the purchase of the land upon the faith that Donahue had fenced the land and was to hold it for Woolf or any one else beside himself, Donahue. (See Exception No. 11 of the foregoing statement, p. 97, fol. 207.)

The court erred in striking out the testimony of Donahue as to whether any person ever contributed towards erecting fences and improvements upon, and keeping possession of, the premises in controversy. (See Exception No. 18 of the foregoing statement, p. 244, fol. 730.)

302 The court erred in striking out that portion of Donahue's testimony in which he denies having delivered plaintiff's Exhibit

No. 4. (See exception No. 16½ of the foregoing statement, p. 97, fol. 288.)

The court erred in striking out Donahue's answer to the effect that he did not know Israel E. Woolf at the time he signed that paper. (See exception No. 17 of the foregoing statement, p. 102, fol. 303.)

The court erred in striking out Donahue's testimony. (See exception No. 18 of the foregoing statement, p. 244, fol. 730.)

The court erred in refusing to allow defendants to prove who paid taxes upon the premises from the time of their entry upon the premises in 1861, down to the commencement of this action and the present time. (See exceptions Nos. 19 and 20 of the foregoing statement, pp. 2455, fol. 731-2.)

The court erred in ruling out and not admitting in evidence the act of Congress of March 8th, 1866; also, ordinance No. 800, and the various acts of the legislature of this State, confirmatory thereof and in relation thereto. (See exception No. 22 of the foregoing statement, p. 266, fol. 795.)

The court erred in admitting in evidence, aganst defendants' objection, the deed from Rice to Friedman, dated April 26th, 1856. (See exception No. 23 of the foregoing statement, p. 269, fol. 798.)

The court erred in admitting in evidence the deeds from Rice to Fleishacker, dated March, 1865, and also the deed from McConnell to Fleishacker, dated March 29th, 1865. (See exception No. 24 of the foregoing statement, p. 267.)

303 The court erred in refusing to strike out the deed from Gautier and Hastings to Friedman. (See exception No. 25 of the foregoing statement, p. 269, fol. 803.)

The court erred in refusing to charge the jury as asked by the defendants, and in giving that portion of the charge specified in exception No. 27 of the foregoing statement, p. 270, fol. 808.

The court erred in that portion of the charge relating to tenancy in possession, and specified in exception No. 28 of the foregoing statement, p. 275, fol. 823.

The court erred in that portion of the charge in relation to prior possession of plaintiff's grantors, and specified in exception No. 29 of the foregoing statement, p. 275, fol. 823.

The court erred in that portion of the charge in relation to tenancy in common, and specified in exception No. 30 of the foregoing statement; also, as specified in exceptions Nos. 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40, pp. 277-8-9-9-9-9-8-0-12-3-5-5, 211, fols. 828 to 852, & 838.

The court erred in that portion of the charge where he charged to the effect that if the jury find that Donahue has only an undivided part of the title derived from the common grantee, under which the plaintiff and defendant both claim, and the plaintiff has another part of that title, then plaintiff is entitled to recover such interest unless the statute of limitations has intervened. (See exception No. 41 of the foregoing statement, p. 280, fol. 838.)

304 The court erred in that portion of the charge in relation to constructive possession, as specified in exception No. 42, p. 286, fol. 854.

The court erred in that portion of the charge relating to abandonment, and specified in exceptions No. 42 and 43, pp. 286-6, fols. 854-5.

The court erred in that portion of the charge relating to the construc-

tion and effect of certain deeds executed by Gautier and Hastings, and specified in exception No. 44 of the foregoing statement. 287, fol. 857.

The court erred in refusing to give instructions Nos. 1, 2, and 3, as asked for by defendants. (See exceptions Nos. 45, 46, and 47 of the foregoing statement, pp. 287–8–9, fol. 860–1–4.)

The court erred in giving instructions Nos. 4 and 8, asked for by plaintiff and excepted to by defendants. (See exception No. 48 of the foregoing statement.)

The court erred in refusing to give certain other instructions asked for by defendants. (See exception No. 49.)

IV.

That the verdict and judgment are against law.

SHARP, LLOYD, AND PATTERSON,
Attys. for Defendants.

The foregoing statement is settled and engrossed correctly as
305 settled. Said statement consisting of three volumes, marked respectively, vols. I, II, and III.

SHARP & LLOYD,
Defendants' Attorneys.
S. W. HOLLADAY,
Plaintiff's Attorney.

Plaintiff's Exhibit No. 2.

[Title of court and cause.]

We, the jury, find for the plaintiff:

1st. (First.) For the possession of an undivided one-quarter of so much of the land described in the complaint as lies within the green lines on the diagram showing the different surveys of the Fleishacker claim (scale 4 chains to 1 inch,) drawn by V. Wackenreuder, July, 1871, used on the trial of this cause, which tract lying between said green lines is also bounded and described as follows: Commencing at the southwesterly corner of Meyer's claim, marked on the diagram as Meyer's corner; thence running N. 52 deg. 30 min. W., 16.04 chains; thence S. 48 deg 35 min. W., 4.09 chains; thence N. 43 deg. W., 16.20 chains; thence S. 89 deg. W., 10.48 chains; thence S. 88 deg. 45 min. W., 0.25 chains; thence S. 43 deg. E., 25.10 chains; thence S. 41 deg. 15 min. E., 10.27 chains; thence N. 60 deg. E., 6.93 chains; thence N. 56 deg. 50 min. E., 2.48 chains; thence N. 65 deg. 30 min. E., 6.24 chains, to the point of beginning, containing $34\frac{30}{100}$ acres of land.

306 2d. (Second.) Also an undivided one-half of so much of the land described in the complaint as lies between the blue lines on said diagram, excepting and excluding the above-described piece of $34\frac{30}{100}$ acres within the green lines, which divided this portion into two separate parcels here described: first, the southerly parcel, commencing on Meyer's corner, thence running S. 56 deg. W., 18.45 chains; thence S. $81\frac{3}{4}$ deg. W., 1.60 chains; thence N. 34 deg. W., 29.55 chains; thence S. 43 deg. E., 18.65 chains; thence S. 41 deg. 15 min. E., 10.27 chains; thence N. 60 deg. E., 6.93 chains; thence N. 56 deg. 50 min. E., 2.48 chains; thence N. 65 deg. 30 min. E., 6.24 chains, to the point of beginning, containing $8\frac{57}{100}$ acres of land.

And second the northerly parcel, commencing at Meyer's corner, thence running N. 52 deg. 30 min. W., 16.04 chains; thence S. 48 deg. 35 min. W., 4.09 chains; thence N. 43 deg. W., 16.20 chains; thence N. 89 deg. E., 2.90 chains; thence S. 89 deg. 15 min. E., 8.00 chains; thence N. 82 deg. 45 min. E., 3.10 chains; thence S. 34 deg. E., 23.05 chains, to the point of beginning, containing $15\frac{66}{100}$ acres of land.

(Here follows map, marked page 306.)

OPINION.

[Title of court and cause.]

This action was tried by a jury, who rendered a verdict in favor of the plaintiff. The defendants move for a new trial. After a careful
307 examination I am unable to find any error, unless in some ruling of the court against the plaintiff, which must have enured to the defendants' interests, if to anybody.

In reading the instructions of the court to the jury, interspersed as they are between, and severing sentences by defendants' objections, together with the absence of punctuation, and mistakes in copying from the reporter's notes, impression will likely be formed as to the meaning intended to be conveyed, which would not be warranted if properly engrossed. For instance, the court is made to say "unless the defendants now, or at some little time held the fee to the land." The word little does not occur in the reporter's notes, and was not used in that connection by the court. How many errors could be found in the statement on a motion for a new trial, the judge of this court has not time to examine the four hundred and thirty-seven pages of the statement, to ascertain.

In regard to the instructions asked for by the defendants which were not given, I think, so far as they are law and applicable to the case, they are incorporated substantially in the general instructions given. I find, also, that an instruction given at the request of the defendants' attorney on the second trial, and also given to the jury on the third trial, by like request, which I distinctly recollect reading to the jury, is wholly omitted, probably from the fact that it being in writing, was not taken down by the reporter, and has been overlooked by counsel.
308 As an exception has been taken to a part of the general charge, treating upon the subject-matter contained in the special instruction asked for, given, and omitted, it should have been, in justice to the court, incorporated in the statement on motion for a new trial. The instruction asked for and given and omitted, reads as follows:

"If the jury believe, from the evidence, that on the 23d day of May, 1861, (the date of the deed—Gautier to Donahue,) L. P. Gautier had no greater interest in the lands just described in his deed to Donahue than the one-half, undivided, of the De Brot tract, which is first attempted to be excepted in said deed, then such exception is null and void; and if the jury believe that, at the same time, said Gautier had not more than one-half, and an undivided one-third of one-half, of the land described in the exception described in said deed, then said exception was void, and all the right of Gautier he conveyed to Donahue."

The original of said instruction was filed August 14, 1871.

No errors having been pointed out by the defendants' counsel, the motion for a new trial is denied.

DWINELLE, *Judge*.

Order denying defendants' motion for a new trial.

[Title of court and cause.]

In this cause the defendants' motion for a new trial was here-
309 tofore submitted, and due consideration being had thereon, the same is hereby denied. And on motion of Wm. H. Patterson, esq., of counsel for defendants, it is further ordered that all proceedings herein be, and they are hereby, stayed for ten (10) days.

THURSDAY, January 2d, A. D. 1873.

Min. D., p. 671.

Notice of appeal.

[Title of court and cause.]

You will please take notice that the defendants in the above-entitled action hereby appeal to the supreme court of this State, from the judgment made and entered in the said district court on the twelfth day of January, 1872, in favor of said plaintiff and against said defendants, and from the whole thereof.

And also from the order made and entered in said action on the 2d day of January, 1873, denying defendants' motion to vacate said judgment, and for a new trial of said action and the whole thereof.

SHARP & LLOYD,
Defendants' Attorneys.

Dated San Francisco, January 27th, 1873.

To the clerk of said court and S. W. Holladay, plaintiff's attorney.

Endorsed: Filed January 27th, 1873.

WM. HARNEY, *Clerk*,
By JOHN P. POOLE,
Deputy Clerk.

310 Due service of a true copy of the within notice of appeal, after filing, admitted this 27th of January, 1873.

PORTER, HOLLADAY & WEEKS,
Plaintiff's Attorneys.

Stipulation.

It is hereby stipulated that the foregoing are full, true, and correct copies of original papers on file in the office of the county clerk in and for the city and county of San Francisco, and ex-officio clerk of the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, and of original orders entered in the minutes of said court in the above-entitled cause; that the same constitute the transcript on appeal of defendants to the supreme court of this State from the judgment entered herein on the eleventh day of January, 1872, in favor of plaintiff, and against defendants, and from the whole thereof and from each and every part thereof, and from the order denying the motion for a new trial therein made and entered on the 2d day of January, 1873. That due notice of intention to move for a new trial was given in due time, and the statement hereinbefore set out was filed in due season, and the motion duly made and argued.

That the said motion for a new trial was heard upon the plead-

311 ings, statement, and papers, copies of which are hereinbefore set out; that notice of appeal from said judgment and order and each and every part therof was given and filed, and served in due time January 27th, 1873; and that an undertaking on appeal in due form has been properly filed.

S. W. HOLLADAY,
Plaintiff's Attorney.
SHARP & LLOYD,
Attorneys for Appellants and Defendants.

312 It is hereby stipulated that the foregoing are full, true, and correct copies of original papers on file in the office of the county clerk in and for the city and county of San Francisco, and ex-officio clerk of the district court of the 15th judicial district of the State of California, in and for the city and county of San Francisco, and of original orders entered in the minutes of said court in the above-entitled cause that the same constitute the transcript on appeal of defendants to the supreme court of this State, from the judgment entered herein, on the eleventh day of January, 1872, in favor of plaintiff, & against defendants, and from the whole thereof, & from the order denying the motion for a new trial therein made & entered on the 2d day of January, 1873. That due notice of intention to move for a new trial was given in due time, and the statement hereinbefore set out was filed in due season, and the motion duly made & argued. That the said mo-
313 tion for a new trial was heard upon the pleadings, statement, & papers, copies of which are hereinbefore set out. That notice of appeal from said judgment and order, & each & every part thereof, was given & filed & served in due time, January 27, 1873, and that an undertaking on appeal in due form has been properly filed.

S. W. HOLLADAY,
Pltff.'s Atty.
SHARP & LLOYD,
Attys. for Applts. & Defts.

(Indorsed:) Supreme court. Jos. S. Friedman, respdt., v. M. McStay, applts. Original stipulation.

(Here follows map marked page 313.)

314 Supreme court, State of California.

FRIEDMAN *vs.* McSTAY. } No. 3733.

It is stipulated that the deeds and foreclosure proceedings mentioned in the transcript were read in evidence on the trial, and, so far as the record purports to give the contents of the deeds, it does so correctly. The descriptions of the lands in said deeds is correctly stated by the witness Wackenreuder; and, so far as the witnesses undertake to state the contents of the deeds, or his or their understanding of what the same conveys, is correct.

W. S. HOLLADAY,
Attorney for Plff. & Respondent.
SOL. A. SHARP,
Atty. for Appellant.

(Indorsed:) Friedman v. McStay. Stipulation. Filed Febr'y 4th, 1875. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

315 Supreme court, State of California.

JOSEPH S. FRIEDMAN, RESPT.,
vs.
M. MCSTAY ET AL., APPLTS.

Defts. & appellants' diagrams marked respectively defendants' diagram No. 1, & defts.' Ex. No. 2, & mentioned in the transcript on appeal herein at page 82, folios 244 and 245, as having been introduced in evidence at the trial herein, having been mislaid so that they could not be inserted in the said transcript, it is stipulated that if appellants so desire they may, at or before the filing of defendants' brief in this case in the above court, file said diagram and exhibit as a part of the record herein with same force and effect as if contained in the transcript printed herein: Provided the case go upon the calendar for the April term, 1873, & this stipulation shall not be construed in any manner as extending appellants' time for filing said transcript April 4th, 1873.

S. W. HOLLADAY,
Atty. for Respt.
SHARP & LLOYD,
Applts.' Atty.

(Indorsed:) 3733. In supreme court, State of California. Jos. S. Friedman vs. M. McStay. Stipulation as to record. Filed April 5th, 1875. Grant I. Taggart, clerk.

316 In the supreme court of the State of California, No. 3733.—January term, A. D. 1875.

JOSEPH FRIEDMAN, RESPONDENT,
vs.
MICHAEL MCSTAY ET AL., APPELLANTS.

On appeal from the district court of the 15th judicial district, in and for the county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by the court from the bench.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment and order of the district court of the 15th judicial district, in and for the county of San Francisco, in the above-entitled cause, be, and the same is hereby, affirmed with costs.

I, Grant I. Taggart, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 4th day of February, A. D. 1875, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this 4th day of October, A. D. 1875.

[SEAL.]

GRANT I. TAGGART, *Clerk.*
By ALLEN TILLINGHAST, *Deputy.*

(Indorsed:) No. 3733. In the supreme court, State of California. Remittitur. Friedman vs. McStay. Clerk's cost, $15; paid by appellant, $15; paid by respond't, $—; total, $15.

GRANT I. TAGGART, *Clerk*,
By ALLEN TILLINGHAST, *Deputy*.

317 Supreme Court of the United States.

MICHAEL MCSTAY, PETER DONAHUE, AND John Kelso, plaintiffs in error,
vs.
JOSEPH S. FRIEDMAN, DEFENDANT IN ERROR.

Know all men by these presents that we, Michael McStay, Peter Donahue, and John Kelso, as principals, and William H. Patterson and Solomon A. Sharp, as sureties, all of the city and county of San Francisco in the State of California, are held and firmly bound unto Joseph S. Friedman of the same place, in the sum of five thousand ($5,000) dollars, to be paid to the said Joseph S. Friedman, his executors, or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this fourth day of August, A. D. 1875.

Whereas the above-named Michael McStay, Peter Donahue, and John Kelso have prosecuted a writ of error to the Supreme Court of
318 the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such that if the above-named Michael McStay, Peter Donahue, and John Kelso shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

P. DONAHUE. [L. S.]
WM. H. PATTERSON. [L. S.]
SOLOMON A. SHARP. [SEAL.]

Sealed and delivered in presence of—
JOS. F. O'BEIRNE.

STATE OF CALIFORNIA,
City and County of San Francisco:

William H. Patterson and Solomon A. Sharp, being severally duly sworn, depose and say, and each for himself deposes and says, that he is one of the sureties named in and who subscribed the foregoing obligation; that he is worth double the amount named in said obligation as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt from execution, and that he is a resident and freeholder within the State of California.

WM. H. PATTERSON,
SOLOMON A. SHARP.

Sworn to before me August 4th, 1875.

JOS. F. O'BEIRNE,
Commr. of U. S. Cir. Court, Dist. of Cal.

(Indorsed:) U. S. Supreme Court, 3733. Michael McStay & al., plffs.

in error, vs. Jos. S. Friedman, deft. in error. Bond. The within bond is approved, and the sufficiency of the sureties thereon. Aug. 4, 1875. S. J. Field, associate justice of U. S. Sup. Ct. 3733. Filed in the office of clerk of supreme court of the State of California, August 4th, 1875. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

319 UNITED STATES OF AMERICA, *ss:*

To Joseph S. Friedman, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Michael McStay, Peter Donahue, and John Kelso are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Stephen J. Field, associate justice of U. S. Supreme Court, this 4th day of August, A. D. 1875, and of the Independence of the United States the 100th.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

(Indorsed:) United States Supreme Court. Michael McStay & al., plffs. in error, vs. Joseph S. Friedman, deft. in error. Citation. I admit service of the within citation this 4th day of August, A. D. 1875. S. W. Holladay, atty. for deft. in error. Office clerk s. court, State of California. 3733. Filed August 4th, 1875. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

320 In the supreme court of the State of California.

FRIEDMAN *vs.* McSTAY. } No. 3733.

I, Grant I. Taggart, clerk of the supreme court, do hereby certify the within and foregoing to be the original writ of error, citation, and full, true, and correct copies of the transcript on appeal, and the judgment, and a full, true, and correct copy of the bond in the above-entitled case as shown by the records of my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court, at the city of San Francisco, this 4th day of October, A. D. 1875.

[SEAL.] GRANT I. TAGGART, *Clerk.*

(Indorsement on cover:) No. 900. Michael McStay, Peter Donahue, and John Kelso, plaintiffs in error, vs. Joseph S. Friedman. California sup. court. Filed 10th January, 1876.

No. .....

In the Supreme Court of the United States.

MICHAEL McSTAY,
PETER DONAHUE and
JOHN KELSO,

Plaintiffs in Error,

vs.

JOSEPH S. FRIEDMAN,

Defendant in Error.

Brief of Plaintiffs in Error.

WILLIAM IRVINE,
of Counsel.

SOL. A. SHARP,
WM. H. PATTERSON,
San Francisco, Cal.
Attorneys for Defendants and Plaintiffs in Error.

Supreme Court of the United States.

No......

MICHAEL McSTAY ET AL.,
Plaintiffs in Error,

vs.

JOSEPH S. FRIEDMAN,
Defendant in Error.

Brief of Plaintiffs in Error on Motion to Dismiss Writ of Error.

The motion is founded on the supposition:—

1st. That no statute of the United States is to be construed or passed upon.

2d. That neither party claimed title under any statute or treaty of the United States.

I.

The demanded premises are situated in the city and county of San Francisco. That municipality asserted its title under the treaty of "Guadaloupe Hidalgo," and presented a claim for four square leagues. This claim was duly confirmed under the act of March 3. 1851 (U. S. Stats. at Large, Vol.9, page —), and the city was adjudged to be, if not the *legal*, the *equitable* owner, with such equities derived

from the Mexican nation as compelled the United States, under said treaty, to respect and uphold the ownership of the city in fee to said quantity of land. (See Exhibit A and Exhibit B, hereto annexed). This right was a vested equity notwithstanding the act of Congress (Exhibit C), because in due course, after the dismissal of the appeal from the decree (Exhibit B), a survey and patent to the city would have followed vesting the legal title in the city, founded upon the equity, which related back to the foundation of the Pueblo.

Bissel v. *Hanshaw*, 18 Wallace, p 255.

II.

Without the necessity of determining whether or not plaintiffs in error have a right to retain possession under the treaty of Guadaloupe Hidalgo, it is clear they offered to connect themselves with the title of the United States, assuming the fee passed to the United States by said treaty.

Grisar v. *McDowell*, 6 Wallace, 365.

The disposal thereof was conferred upon Congress March 8th, 1866 (Exhibit C). The same was granted to the city. "That all the right and title of the United States to the land * * * are hereby relinquished and *granted* * * * a present, immediate and complete grant to said city * * * * and the same shall be disposed of and conveyed by said city to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe."

The city could take this grant, charged with the trust, and could not grant the same to any other than one who was in the *actual bona fide possession March* 8, 1866, because such a disposition would be a violation of the trust. It is not pretended defendant in error connected himself with that title, because not in the actual possession; while plaintiffs in error proved their actual possesion, and it resulted that Donahue obtained the title, under Exhibit D.

III.

Inasmuch as it is claimed that plaintiffs in error acquired title under the United States, and this can only be determined by an inspection of the record, the Court will not determine the question of jurisdiction on the motion.

WM. IRVINE,
Of Counsel.

SOL. A. SHARP, AND
WM. H. PATTERSON,
Att'ys for Defendants and Plaintiffs in Error.

We here insert the Decrees, Act of Congress, Order 800, and the Act of the Legislature, marked Exhibits "A," "B," "C," and "D."

Exhibit A.

United States Land Commission for California.

Decree of Confirmation, filed December 21st, 1854.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES. } No. 280.

In this case, on hearing the proofs and allegations, it is adjudged by the Commission, that the claim of the petitioner is valid, and it is therefore decreed that the same be confirmed.

The land of which confirmation is made, is that known by the name of the Pueblo lands of San Francisco, and is bounded as follows: Beginning at the little cove to the east of the Fort, and running across the beach so as to leave the Fort and casamata to the north; thence running along the beach to Point Lobos on its southern part; thence a straight line to the summit of the Devisadero, continuing said line to the east as far as the Punta del Rincon, including the canutales and El Gentil, the said line will terminate within the Bay of the Mission of Dolores—the estuary of which will form a natural boundary between the municipal jurisdiction of that Pueblo and the said Mission of Dolores;

thence along the shore of the Bay of San Francisco as it existed in the year 1834, to the point of beginning. For a more particular description, reference to be had to the copy of the order from Governor Jose Figueroa to General Mariano G. Vallejo, dated Monterey, November 4th, 1834, marked Exhibit No. 18, to the deposition of M. G. Vallejo, taken in No. 280, H. I. T., and now on file among the papers in the case.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL.

Exhibit B.

Final Decree confirming the claim of the City of San Francisco to its Pueblo lands, entered May 18, 1865.

THE CITY OF SAN FRANCISCO
vs.
THE UNITED STATES.

The appeal in this case taken by the petitioner, the City of San Francisco, from the decree of the Board of Land Commissioners, to ascertain and settle the private land claims in the State of California, entered on the twenty-first day of December, 1854, by which the claim of the petitioner was adjudged to be valid and confirmed to lands within certain described limits, coming on to be heard upon the transcript of proceedings and decision of said Board, and the papers and evidence upon which said decision was founded, and further evidence taken in the District Court of the United States for the Northern District of California pending said appeal—the said case having been transferred to this Court by order of the said District Court, under the provisions of section four of the Act entitled "An Act to expedite the settlement of titles to lands in the State of California," approved July 1st, 1864—counsel of the United States and for the petitioner having been heard and due deliberation had, it is ordered, adjudged and decreed that the claim of the petitioner, the City of San Francisco, to the land hereinafter described, is valid, and that the same be confirmed.

The land of which confirmation is made, is a tract situated

within the County of San Francisco, and embracing so much of the extreme upper portion of the peninsula above ordinary high water mark (as the same existed at the date of the conquest of the country, namely: the seventh day of July, A. D. 1846); on which the City of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area aforesaid, subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States; and also such parcels of land as have been by grants from lawful authority vested in private proprietorship, and have been confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by such tribunals in proceedings now pending therein for that purpose; all of which said excepted parcels of land are included within the area of four square leagues above mentioned, but are excluded from the confirmation to the city. *This confirmation is in trust for the benefit* of the lot holders under grants from the Pueblo, Town, or City of San Francisco, or other competent authority, and as to any residue, *in trust for the use and benefit of the inhabitants of the city.*

San Francisco, May 18th, 1865.

FIELD, Circuit Judge.

Exhibit C.

An Act to Quiet the Title to certain Lands within the corporate limits of the City of San Francisco.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That all the right and title of the United States to the land situated within the corporate limits of the City of San Francisco, in the State of California, confirmed to the City of San Francisco, by the decree of the Circuit Court of the United States for the Northern District of California, entered on the

18th day of May, one thousand eight hundred and sixty-five, be and the same are hereby relinquished and granted to the City of San Francisco and its successors, and the claim to said city to said land is hereby confirmed, subject, however, to the reservations and exceptions designated in said decree, and upon the following trusts, namely: that all the said land not heretofore granted to said city, *shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe*, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses, provided, however, that the relinquishment and grant by this act shall not interfere with or prejudice any valid adverse right or claim, if such exist, to said land, or any part thereof, whether derived from Spain, Mexico or the United States, or preclude a judicial examination and adjustment thereof.

Approved March 8th, 1866.

Exhibit D.

(Statutes 1867–68, p. 379.)

Abstract of an Act to confirm a certain Order passed by the Board of Supervisors of the City and County of San Francisco, Approved March 27th, 1868.

SECTION 1. Whereas, the Board of Supervisors of the City and County of San Francisco, passed an order number eight hundred, which said order was approved by the Mayor and President of the Board of Supervisors on January 14th, eighteen hundred and sixty-eight, and which is as follows:

Order No. 800. An order for the settlement and quieting titles to land in the City and County of San Francisco situate above high water mark of the Bay of San Francisco and the Pacific Ocean, and without the corporate limits of the City of San Francisco.

The People of the City and County of San Francisco do Ordain as follows:

N. B. Here follows a copy of the order, of which Section

eleven of said order No. 800, is in words and figures following, to wit:

SEC. 11. Upon the payment to the County Treasurer of the City and County of San Francisco, of the amount assessed by the Committee provided for in Sec. 10 of this order, the City and County of San Francisco hereby relinquishes and grants all the right and title and claim which the said city and county now has or may hereafter acquire as successor of the Pueblo of San Francisco, or as grantee, or the patentee of the United States, in and to the lands hereinbefore in this order described, and not excepted or reserved, or intended to be excepted or reserved, by any of the preceding sections and provisions, and upon which shall be paid, previous to the first day of April, A. D. 1868, all taxes which have been assessed thereon during the five fiscal years preceding the year beginning July 1st, A. D. 1866, under the persons, or to the heirs and assigns of persons who were on the 8th day of March, A. D. 1866, in the actual *bona fide* possession thereof, by themselves or their tenants, *or having been ousted from such possession, before or since said day, have recovered, or may recover the saem by legal process.* And it is hereby declared to be the intent and object of this section to pass the right, title and claim of the said city and county, in and to every tract or portion of said land delineated on said map, except the portions that are or may be reserved as aforesaid, possessed by one person, unto the possessor thereof in severalty; and every separate tract or portion thereof, except the portions that are or may be reserved as aforesaid, possessed by more than one person, jointly or in common, unto the possessors thereof, jointly or in common.

No. _____

In the Supreme Court

—OF THE—

UNITED STATES.

MICHAEL McSTAY, PETER DONAHUE and JOHN KELSO,

Plaintiffs in Error.

vs.

JOSEPH S. FRIEDMAN,

Defendant in Error.

Notice of Motion to Dismiss Writ of Error,

AND

Brief in Support of Same.

S. W. HOLLADAY,
Atty. for Deft. in Error.

A. A. SARGENT,
Of Counsel.

Bonnard & Daly, Brief and Transcript Printers, 609 Merchant street.
1876.

IN THE SUPREME COURT

OF THE

UNITED STATES.

MICHAEL McSTAY, PETER DONAHUE and JOHN KELSO,
Plaintiffs in Error,
vs.
JOSEPH S. FRIEDMAN,
Defendant in Error.

No.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

The above named plaintiffs in error will please take notice that on Monday, the 17th day of April, 1876, at the opening of the Supreme Court of the United States, at the City of Washington, D. C., at the Court room thereof, on that day, or as soon thereafter as counsel can be heard, we will, on behalf of the above named defendant in error, move said Court to dismiss the writ of error herein, on the ground that said Court has no jurisdiction therein, as no Federal question is pre-

sented in the record accompanying said writ sent up from the Supreme Court of the State of California, and no question is presented in said record cognizable in the said United States Supreme Court.

The grounds of said motion and the particular authorities and arguments in support thereof more fully appear in the printed brief and argument to be submitted to the Court at the time of making said motion, a copy of which is now and herewith served upon you.

Very respectfully,

S. W. HOLLADAY,

Attorney for Defendant in Error.

A. A. SARGENT,

Of Counsel.

To William Irvine, of counsel for plaintiffs in error.

San Francisco, March 14, 1876.

MOTION TO DISMISS WRIT OF ERROR.

Now comes Joseph S. Friedman, the defendant in error herein, pursuant to the foregoing notice, and moves the Court to dismiss the writ of error herein, and for grounds of said motion, said defendant in error specifies the following:

First.—The Supreme Court of the United States has no jurisdiction herein.

Second.—The record in said cause presents no case cognizable in said Supreme Court of the United States.

Third.—No Federal question is involved or arises in said record, or is presented therein, whereof the asid U. S. Supreme Court has jurisdiction, or can take cognizance.

And in support of said motion, and of the said grounds specified, defendant in error, by his counsel, now hereby submits to this Honorable Court the following considerations :

BRIEF ABSTRACT OF THE RECORD.

This cause comes to this Court upon a writ of error directed to the Supreme Court of the State of California, wherein was affirmed the judgment recovered by Friedman *vs.* McStay, Donahue and Kelso, in the Fifteenth District Court, City and County of San Francisco, in an action to recover the possession of certain land in said city and county

COMPLAINT.

The action is in form a simple ejectment, wherein plaintiff alleged title and possession in himself, and a wrongful entry and ouster, and continued holding by defendants, and a prayer for restitution of the premises, and for damages and costs. (See complaint in the record.)

ANSWER.

The answer denies these averments and sets up title in defendant Donahue ; that the other defendants are his tenants ; that defendants have held the premises many years adversely, with specifications to bring them within the provisions of the Statute of Limitations of California.

The answer further sets up and avers that on the 8th of March, 1866, Congress passed an Act entitled "An Act to quiet the title to certain land within the corporate limits of the City of San Francisco," and that subsequently the Board of Supervisors of the City and County of San Francisco, passed a certain Ordinance numbered 800, approved by the Mayor, January 14th, 1868, for the settlement and quieting of title to land in the City and County of San Francisco, &c., and that the Legislature of California ratified said Ordinance 800, by an Act passed and approved March 20th, 1868; and that defendant Donahue, was in possession of the demanded premises at the date of the said Act of Congress, March 8th, 1866, and more than five years prior thereto and ever since; "and that said Donahue did prior to the day of April, 1867, pay all taxes which had been assessed on said land and premises during the five fiscal years preceding the year beginning " and that the premises sued for are a part of the lands mentioned in said Act of Congress, said Order and said Act of the Legislature "and the Decree of the Circuit Court of the United States for the northern District of California, entered on the 18th day of May, A. D. 1865;" and that the premises are within the corporate limits of the City and County of San Francisco; that the said Peter Donahue is ready and willing, and intends to comply with all the terms of said Order 800, and to do everything required by said Acts

of Congress and of the Legislature, and to avail himself of all the rights and benefits of said Acts and of said Order 800, and that the defendant Peter Donahue is entitled to all the rights, &c., conferred by said Acts, and has become the owner in fee simple of all the right, title and claim, which the city and county ever or may hereafter acquire, as the successor of the Pueblo of San Francisco, or as the grantee or assignee or patentee of the United States, in and to the said lands. (No Ordinance or Statute appears in the record.)

STATEMENT OF THE RECORD OF THE TRIAL.

The case was tried by jury, and a verdict and judgment were rendered for the plaintiff, Friedman, against the defendants, for an undivided interest in the demanded premises; as to one parcel for an undivided ¼, and as to other parcels for an undivided ½.

Defendants' motion for a new trial was denied, and they appealed from the judgement and from the order denying their motion for a new trial, to the Supreme Court of Cal., wherein, after argument, the judgment was affirmed, from the bench, without any written opinion having been rendered.

PLAINTIFF'S PROOFS.

The record shows that the plaintiff at the trial, relied upon proof of prior possession of the demanded premises in his grantors, followed by conveyances down to himself, and nothing else.

See "Engrossed Statement on Motion for a New Trial" in the record, (folio 48 and 52, of the printed record in Cal. Supreme Court,) which shows Harry DeBrot to have been the first possessor in the year 1850; he conveyed to Fleishacker, Woolf & Davis, (folio 53)—possession of the property by their tenant, after Fleishacker left, (folio 66 and 104) and so on down to plaintiff, with nothing further except a paper signed by defendant, Donahue, at the time he first purchased an undivided interest in and entered upon the demanded premises, wherein he acknowleded that Israel E. Woolf, one of the plaintiff's grantors, at a certain time was the owner of an undivided one-half of the land, (folio 59 and 188).

Such, in brief, was the plaintiff's case—merely the proof of possession of the land by his grantors, DeBrot, Fleishacker and others, and their tenants, and the written acknowledgement of title in Woolf, one of plaintiff's grantors, signed by Donahue.

THE DEFENDANT'S PROOF WAS SIMILAR.

(See folio 223), consisting merely of proof of possession, in the same common grantor, Samuel Fleishacker, conveyances to various parties and their possession thereunder, tending to show adverse possession, to make out a defence under the Statute of Limitations.

The testimony is all directed to the question of prior possession and of adverse holding by the parties and their grantors.

Neither party pretended to connect with the United States or the City of San Francisco, by written conveyances of the land.

At folio 731, the question was asked by defendant, and ruled out, as to "who paid the taxes upon "that property for the revenue of 1861 and 1862."

This ruling constitutes one of the capital exceptions of defednants.

Again, at folio 732, Mr. Patterson, defendant's counsel said: "I propose to prove that Donahue "paid taxes on that property, from 1861 down to "the commencement of this suit."

Mr. Holladay.—"That I object to." Objection sustained and exception. The Court remarked: "I think I ruled against both of you, on that point."

Again, at folio 793, the defendants attempted to connect themselves with the title under the Act of Congress of March 8th, 1866, and the Ordinance 800, of the City of San Francisco, and the Act of the Legislature, ratifying the same, but they failed to make the connection complete. Those Acts, &c., are alluded to with scarcely sufficient particularity to enable us to tell what was meant, as follows:

"*Mr. Sharp.*—We put in evidence now the Act of Congress of March 8th, 1866. Also, Ordinance 800, of the Board of Supervisors. Also, the Act of the Legislature, confirming Ordinance 800."

"*Mr. Holladay.*—What is the purpose of these?"

"*Mr. Patterson.*—To show title in ourselves."

"*Mr. Holladay.*—Do you propose to *connect yourselves by deed with the city?*"

"*Mr. Patterson.*—*No, sir.* We say the Ordinance and Acts of Congress and the Legislature give us title without a deed."

"*Mr. Holladay.*—We object to this as irrelevant, incompetent and immaterial."

"*The Court.*—I have held all through that the "fee has not passed by the Act of the Legislature, "and does not until the outside Land Committee "determines and passes upon it, and the Mayor "executes a deed."

This is all on that point.

There was no exception to this ruling.

Defendants here expressly *admit that they have no deed from the city.*

If the Act of Congress was sufficiently referred to, to make it a part of the evidence in the case, it did no good to defendants, as it gave the land to the city, but not to defendants. They are still strangers to the paramount title. The fact is, that neither party showed any connection with the title which had lately passed from the United States to the City and County of San Francisco, by the Act of Congress of March 8, 1866, for at the time of the trial, the title had passed no further.

"The title of the city was not drawn in question." Writ dismissed.

Romie *vs.* Cassanova, No. 127, Oct. Term, 1875.

In McManus *vs.* O'Sullivan, No. 543, Oct. Term, 1875, this Court say:

"McManus and his representatives *do not pre-*

"*tend to connect* themselves with the city title by "any *actual grant.* The extent of their claim is, "that their possession was evidence of their con- "nection with the true title, which was at that "time the city title. Neither do the defendants "assert any claim under the true title. Their "only defence is possession adverse to the estate "of McManus, but admitted to be not adverse to "the city." * * * "Thus, it will be seen that "two questions were properly presented to the Su- "preme Court of California for adjudication, to wit:

"1. Does possession necessarily connect itself "with the true title in the absence of proof to the "contrary?

"2. (As to adverse possession.)

"If these questions were decided against the plain- "tiff, no Federal question could be involved. The "record without the opinion of the Court shows "that they were presented, and *does not show that* "*any Federal question was decided.*" * * * "Thus, it is seen that the Federal question was, in "fact, not decided." * * "And that such "decision was not necessary. It is clear, there- "fore, that we have no jurisdiction of this case, "and that it must be dismissed."

The above case lately decided in this Court is decisive of this present motion. The land in that suit was the same land involved in this.

The main defendant in this suit, Donahue, was also the main defendant in that.

The chief difference in the two cases is, that in that suit the plaintiff took the writ of error, while it was the defendants in this.

II.

No opinion was rendered by the Supreme Court of California in this case, beyond a simple affirmance of the rulings and judgment of the Court below.

By reference to the record in this case, *it does not appear* that in the numerous exceptions to the evidence, and to the charge to the jury, any one of them, points towards any Federal question, as having been presented to or decided by the Court.

If there was such, we fail to see it, and doubtless the counsel for the plaintiffs in error will be able to point it out. If they fail to do so, then this Court may safely infer there is none.

III.

Writs of Error from the Supreme Court of the United States to State Courts are matters of limited and special cognizance, and parties who invoke the aid of such writ should be able promptly and clearly to show how and whereby they are entitled to it. To give this Court jurisdiction, in case of a writ of error to a State Court, not only exceptions must appear, but exceptions on questions of a special nature, such as are clearly designated in the Judiciary Act. But if the record fails to show that any Federal question was presented to, or con-

sidered or decided by the Court, (as in this case,) then all further inquiry by this Court into the merits of the case is at an end.

It is sufficient to suggest, without argument, that something more than a naked "claim" is necessary (on the part of plaintiffs in error) of a right, under a Statute of the United States, to give this Court jurisdiction of a writ to a State Court.

The record must show that they connect themselves with the alleged title, and that the decision of the Court deprived them of the title thus asserted.

As soon as it appears to the Court, preliminarily, that such claim is merely colorable and not real, so soon will this Court dismiss the writ.

See the Judiciary Act, at §709, page 102 of Desty's Federal Procedure.

In the case at Bar, the "validity" of the Act of Congress is not "drawn in question," but, on the contrary, its validity is asserted by both sides.

The record fails to show that the defendants below connected themselves with the city title, but it shows affirmatively that they did not.

They say that Order 800 gave them the title, because they were in possession; but they fail to show this Court by the record what Order 800 is, or what the Legislative Act is, which they say they offered in evidence.

They failed to put either of them in the record, and yet they ask this Court to assume that the

Order and Statute contain matters favorable to them, and that the Court disregarded their rights under the Order and Statute. "To vouch this, is no proof."

But, conceding that the title has fully passed from the United States to the city, then there is no longer any Federal question involved; but whether one party or the other, or neither, has succeeded to that title is no longer a question for the Federal tribunals, but one of purely State cognizance.

IV.

The pamphlet of "Points and Authorities of Plaintiffs in Error," in this case, by William Irvine, of counsel, served on counsel for the defendant in error, December 27, 1875, and also, another pamphlet, entitled "Supplement to Points and Authorities of Plaintiffs in Error," by the same counsel, and served February 4th, 1876, taken separately or singly, *fail to show that any federal question was involved* in the trial of this cause in the State Courts.

They seem to have misdirected their efforts towards a review of the numerous exceptions taken at the trial in the State Court, apparently overlooking the fact that very different questions, only, can be considered on this writ of error.

Murdock *vs.* City of Memphis, 20 Wallace, 634.

"Finally, we hold the following propositions on this subject as flowing from the Statute as it now stands.

1. "That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it *shall appear* that one of the questions mentioned in the Act must have been raised and presented to the State Court."

2. "That it must have been *decided* by the State Court, or that its decision was necessary to the judgment or decree rendered in the case."

3. "That the decision must have been against the right claimed, &c."

Where does it appear in this case that the defendants in the State Court, connected themselves with the paramount title, confessedly in the City and County of San Francisco? They expressly admitted that they did not expect to connect with the city by deed, but they claimed that their possession was sufficient to tole the city title through Ordinance 800, which they say they offered in evidence, but where is it? What are its terms? They leave this Court to guess that the Ordinance 800 contains something favorable to them. It is not in the record.

In Romie *vs.* Cassanova, (*supra*,) this Court said: "The title of the city was not drawn in question. It is said that depended upon the treaty of Guadalupe Hidalgo and the several Acts of Congress, to ascertain and settle private land claims in California, *but this does not appear in the record.* But even if it did, the case would not be different, for *both parties admit the title of the city*, and their litigation extends only to the determination of the rights which they have severally acquired under it."

Now, applying the doctrine of that case to the question in hand, we say:

1. The Ordinance 800 does not appear in this record, nor the Act of Congress, nor the Act of our Legislature relating thereto.

2. The legal title to the land in suit was conceded to be in the City of San Francisco.

3. That neither party had a deed from the city.

4. That the question tried in the cause was that of *priority of possession* simply.

5. That did not involve the validity of any Statute of the United States.

6. Neither their record or briefs present any Federal question for consideration, either in the Court below or in this Court.

Finally, as their briefs fail to show that any Federal question is in this record, we may safely assert there is none, and we challenge them to point it out.

Respectfully submitted,

S. W. HOLLADAY,
San Francisco, Cal.
Attorney for Defts. in Error.

A. A. SARGENT,
Washington, D. C.,
Of Counsel.

March 14, 1876.